SUPREME COURT U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on January 5, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1948 (R. 18). A motion for a new trial, seasonably filed, was denied on April 5,

1948 (R. 18). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the clause of Section 902 of the Merchant Marine Act, 1936, (the statute authorizing the wartime requisitioning of merchant ships) which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use" undertakes to bind the Court of Claims in determining the just compensation due an owner whose ship was taken under the Act.

2. If so, whether the clause is invalid as denying the "just compensation" required by the Fifth Amendment.

3. If the clause is valid and applicable to judicial determinations of just compensation, what is the measure of the enhanced value required to be excluded from such determinations.

STATUTE INVOLVED

The pertinent portions of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1242, are set forth in Appendix A, pp. 29-32.

STATEMENT

This is a suit under Section 902 of the Merchant Marine Act, 1936, as amended, to recover the balance of just compensation alleged to be due to

respondent from the United States for the requisitioning of his steamtug, the *MacArthur*, in October 1942 (R. 1-4).

The *MacArthur*, formerly the *Guthrie*, was built at Baltimore in 1895 for the Coast Guard. It was a small harbor boat used by the Coast Guard in Baltimore harbor, from 1895 to 1939, as a boarding tender or tug to transport immigration, customs, and health officers from the shore to vessels arriving in the harbor (R. 5-6). In the latter part of 1939, the *Guthrie* was transferred from Baltimore to the Coast Guard base at Portland, Maine (R. 7).

In September, 1941, a special Board of Survey, appointed by the Coast Guard to ascertain the vessel's condition and to make recommendations regarding her disposition or repair, reported that, under normal conditions and considering the vessel's age, the expense of putting her in operating condition would not be justifiable and the vessel should be placed out of commission, but that, in view of the emergency and the great need for vessels, certain designated repairs should be made so that three or four more years of satisfactory service could be had from the vessel (R. 7-8). However, Coast Guard Headquarters directed that the *Guthrie* be sold to the highest bidder in accordance with regulations (R. 8). The sale was advertised and conducted as an open-market transaction, and sealed bids were requested, but only three were received. Respondent was the highest bidder and

on March 19, 1942, the vessel was sold to him in Maine for the sum of $2,875 (R. 8).

During the period from March 19, 1942 to April 26, 1942, respondent caused certain repairs and improvements to be made to the vessel and purchased additional equipment. He expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had not respondent, who was experienced in performing and supervising such work and tried to keep the costs as low as possible, performed part of the work himself, with the aid of a crew of four. The remainder of the work was performed by a shipyard at Portland (R. 8-9). On April 20, 1942, respondent received from the Bureau of Marine Inspection and Navigation of the Department of Commerce a Certificate of Inspection which had been withheld pending completion of repairs on the boiler (R. 8). This certificate designated the vessel as a "towing steam vessel" and permitted it "to navigate for one year, the waters of bays, sounds, rivers and harbors" (R. 8). On April 21, 1942, the Department of Commerce issued a Consolidated Certificate of Enrollment and License authorizing respondent to employ the vessel in the coasting trade for one year (R. 9).

On completion of the repairs and improvements, the *Guthrie* was brought to New York under her own power, and after a few days at an East River pier, was moored at Staten Island, where she remained until taken by the United States. She did

not engage in any towing operations or commercial work at any time while in respondent's possession. The vessel's name was changed to *MacArthur* in New York, (R. 9).

Late in September, 1942, a naval officer surveyed the *MacArthur* to determine her suitability for use on the Navy's Eastern Sea Frontier as a steam heating plant for heating and pumping fuel oil from oil barges into naval combat vessels. This survey termed the vessel's condition, on the whole, to be "fair to good," estimated her original cost at $45,000 and replacement cost at $56,000, and appraised her present value at $9,000[1] (R. 9-10). On October 15, 1942, the War Shipping Administration requisitioned the vessel pursuant to Section 902[2] of the Merchant Marine Act of 1936, as amended, and took from respondent the entire ownership, possession, and use of the vessel, her equipment and spare parts (R. 5).[2] After her requisitioning, the vessel was used by the Navy

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[1] This appraisal was based on the opinion that the vessel had six years left of useful life, that her value should be depreciated during the remaining useful life at 3.3 per cent per year, and that she was accordingly now worth 19.8 per cent of her estimated cost, or about $9,000; market value was not taken into account in this appraisal (R. 10).

[2] Executive Order 9054, February 7, 1942 ("Establishing a War Shipping Administration in the Executive Office of the President and Defining Its Functions and Duties") (7 Fed. Reg. 837, 3 CFR, Cum. Supp. (1943) pp. 1086-8) transferred certain powers and functions of the Maritime Commission under the Merchant Marine Act, including those pertaining to requisition, to the War Shipping Administration. Section 202 of the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 Stat. 481, 501, retransferred these powers to the Maritime Commission as of August 30, 1946.

at the docks of the Eastern Sea Frontier for furnishing steam to heat oil for use in combat vessels (R. 10).

The War Shipping Administration determined the amount of $9,000 to be just compensation for the *MacArthur*, and on May 18, 1946, offered that sum to respondent (R. 5). In making this determination, the Administration was guided by the 1941 Coast Guard survey rendered before sale of the vessel to respondent (*supra*, p. 3), by the September 1942 naval survey immediately prior to the requisitioning (*supra*, p. 5), and by the rules established by the Advisory Board on Just Compensation (R. 11).[3] Respondent accepted 75%

[3] Executive Order 9387, October 15, 1943 ("Establishing An Advisory Board on Just Compensation and Prescribing Its Functions") (8 Fed. Reg. 14105, 3 CFR 1943 Supp., ch. II, pp. 48-9) established an Advisory Board on Just Compensation, consisting of Judges Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr., to aid in the determination of just compensation to be paid by the War Shipping Administration for requisitioned vessels. The Order provided in part:

> "4. The Board, in accordance with the applicable provisions of the Constitution and the laws of the United States, shall establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered or insured by the Administration. The Board may prescribe such rules, regulations and procedures as it deems necessary or advisable in carrying out its functions.
>
> 5. In determining the amount of just compensation, which should be paid for each vessel, the War Shipping Administration will be guided by the general standards, rules and formulae established by the Board."

On December 7, 1943, the Board submitted to the Administrator of the War Shipping Administration its report, containing the rules for the determination of just compensation which are set forth in Appendix B, *infra*, pp. 33-38.

of the Administration's award ($6,750), and brought this suit under Section 902 of the Act to recover the balance of $20,000, alleged to be the amount respondent was entitled to receive as just compensation, plus interest (R. 4, 5).

The Court of Claims found that the "fair market value of the *MacArthur* at the time and place of the taking was $15,500.00" (R. 12). There then existed in and about the Port of New York "a rising market and a strong demand for tugs of all types, including the *MacArthur*," but most tug owners were reluctant to sell because of the greatly increased business. From August, 1941 to February, 1943, six tugboats were sold on the open market in that area, but none of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment (R. 11-12). The Court of Claims also found (R. 12-13):

> Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7, 1941, the date of the Japanese

attack on Pearl Harbor, the rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect.

Judgment was granted for the sum of $15,500, plus interest, less the amount already paid by the United States (R. 13, 18).

The Court of Claims stated, in its opinion, that it was not possible to allocate the $5,000 of "enhanced value" between, first, "the great increase in shipping and harbor traffic due to the war," and, secondly, "the government's need for vessels in the prosecution of the war, which necessitated the requisitioning of many of them"; but it also stated that even if it were possible to make such an allocation, the United States would not be entitled to a deduction from market value on account of enhancement attributable to its need for vessels in the prosecution of the war (R. 14). The court held that just compensation requires the Government to pay the property owner the price he could

have secured from someone else, and that respondent could have obtained $15,500 from other willing purchasers.[4] The "enhancement value" clause of Section 902(a)—the clause which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use"—was held not to be binding on the courts, but only on the administrative agency, since the determination of just compensation was said to be solely a judicial function, and that it must be presumed that the Merchant Marine Act was passed with that principle in mind (R. 14, 16, 17).

Since the Court of Claims' opinion indicated that it might have rested on a concession by government counsel that the "enhancement value" clause of Section 902(a) was not binding, or intended to be binding, on the courts (R. 17), the United States filed a motion for a new trial, in which it was pointed out that it was the government's position that (a) the "enhancement value" clause of Section 902(a), properly construed, was binding on the courts, including the Court of Claims, in determining just compensation, and (b) the statute, so construed, was valid and constitutional. This motion for a new trial was denied, without opinion, on April 5, 1948 (R. 18).

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[4] The United States did not, and does not now, contest the finding that on October 15, 1942, respondent could have sold the vessel to other potential purchasers for $15,500.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the "enhancement" clause of Section 902(a) of the Merchant Marine Act, 1936, as amended, does not undertake to bind the courts when they are called upon to fix just compensation for vessels requisitioned under that Act, and in failing to hold that the court was required to determine such just compensation in accordance with the terms of the "enhancement" clause.

2. In failing to hold that the "enhancement" clause of Section 902(a) of the Merchant Marine Act, 1936, as amended (construed so as to be applicable to judicial determinations of just compensation under that Act) is constitutional and valid.

3. In holding that respondent should recover, on account of the taking of his vessel, the full market value of the vessel as of the time and place of taking, regardless of the amount by which that market value was enhanced by the causes necessitating the taking.

4. In failing to find the sum by which the vessel's market value at the time and place of taking (as found by the court) was enhanced by the Government's need for vessels in the prosecution of the war which necessitated the requisitioning of many of them, and in failing to reduce the amount awarded to respondent by the enhanced sum.

5. In entering judgment for respondent in the amount in which it was entered.

REASONS FOR GRANTING THE WRIT

In holding that the "enhancement" clause of Section 902(a) of the Merchant Marine Act "was not intended to lay down a rule binding" on the courts, but was merely a "direction to the administrative agency" which is without significance in a judicial proceeding to fix just compensation, because such a determination is solely a "judicial function" (R. 17), the Court of Claims has largely devitalized an important Congressional effort to control excessive war profits and to assure the Government in wartime of adequate shipping facilities at fair prices. This decision has great present and potential importance, and, in our view, constitutes both a serious misinterpretation of the Merchant Marine Act and a misapplication of the Fifth Amendment's requirement that "just compensation" be paid for a taking of private property for public use.

1. The important questions raised by the Court of Claims' categorical refusal to apply the "enhancement" clause to its own just compensation determinations warrant review here. There are now about seventy suits in that court, and several in the various district courts, for just compensation for the taking of merchant vessels under Section 902 of the Merchant Marine Act, and in almost all

of these cases judicial application of the "enhancement" clause would materially affect the awards. In addition to this large bloc of cases directly affected by the present statute and by the instant decision, the lower court's suggestion that application of the "enhancement" clause to judicial proceedings would render the statute unconstitutional presents the broader question—of great significance to all wartime exercise of eminent domain—of the power of Congress to define the proper measure of "just compensation" for war requisitioned property so as to exclude inflation of values stemming from the Government's large and pressing needs for supplies and equipment. This is the method of eliminating undue war profits which Congress deliberately adopted, in 1936, with respect to the single field of merchant vessels, and the lower court's adverse judgment on that statute, if allowed to stand, would cast serious doubt on the validity and availability of this means of controlling war profiteering and limiting war costs.

2. The text and legislative history of Section 902 demonstrate that the "enhancement" clause was designed to apply to judicial determinations of just compensation, as well as to the initial administrative award, if that could constitutionally be done. Section 902(a) states the limitation in general words, as a partial definition of just compensation, and without any indication that it is to govern

only the administrative proceedings.[5] Subsection (d) provides for initial determination and payment of the "just compensation authorized by this section" by the Maritime Commission, and then entitles a dissatisfied owner to accept 75% of the administrative award and to bring suit for "such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor * * *." The latter language, pertaining to the courts, does not purport to alter or exclude the definition of just compensation contained in subsection (a), and it is clear, from the text of the two paragraphs alone, that the measure of compensation was to be the same for the courts as for the Commission. Moreover, it is inconceivable that a Congress, intent on precluding payment of excess wartime values, would have nullified its purpose by directing the "enhancement" restriction solely to the administrators; if that were the statutory design, owners of ships of substantially enhanced value would automatically refuse Commission awards and resort to the courts to secure the additional compensation denied them administratively under the statute.

The legislative history of the clause confirms this reading. As it was passed in 1936, Section 902 of

[5] "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

the Merchant Marine Act required the payment of the "*fair actual value*" of requisitioned vessels which had not been subsidized by the Government (*i.e.* on which a construction differential subsidy had not been paid), "and in no case shall such fair actual value be enhanced by the causes necessitating the taking"; the Commission was to "ascertain the *fair* compensation for such taking or use" and a dissatisfied owner was authorized to sue the United States "for the amount of such *just* compensation" (italics supplied). 49 Stat. 1985, 2015-2016.[6] The sparse legislative history relevant to the

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[6] In brief, the legislative history of the "enhancement" clause (from 1916 to 1936) is as follows. Section 10 of the Shipping Act of 1916 (Act of September 7, 1916, 39 Stat. 728, 731) empowered the President to requisition "any vessel purchased, leased, or chartered" from the United States Shipping Board, and provided for the payment of "the fair actual value *based upon normal conditions* at the time of taking * * *" [This provision was repealed by Section 903(a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 2016]. In 1922, in the 67th Congress, various merchant marine bills were introduced (H.R. 10644, H.R. 12021, H.R. 12817) which contained an "enhancement" clause with substantially its present wording; however, these bills limited the requisitioning powers to vessels which had been owned or financially aided by the Federal Government; all of these bills failed of enactment [see H. Rept. No. 1112, 67th Cong., 2d Sess., pp. 18, 29; S. Rept. No. 935, 67th Cong., 4th Sess., pp. 24, 35; 63 Cong. Rec. 97, 367-8]. In the 68th Congress, the House of Representatives appointed a Select Committee of Inquiry into Operations, Policies and Affairs of the United States Shipping Board Merchant Fleet Corporation, which held extensive hearings; this Select Committee's report to the 69th Congress (H. Rept. No. 2, 69th Cong., 1st Sess., pp. 31-32, 35) referred to the "fabulous" prices paid for vessels in World War I and recommended amendment of Section 10 of the Shipping Act of 1916, *supra*; "so as to clearly and specifically provide that in the event of a future national emergency and the need for such [Shipping Board] ships for national defense, the Government could take them over on the basis of charter rates prevailing before the emergency arose, or at the world market value of such ships

extension of the "enhancement" clause to unsubsidized vessels contains nothing to indicate that the clause, despite the statutory text, was to be read as inapplicable to judicial proceedings. 80 Cong. Rec. 9885, 9920-9921, 10077. On the other hand, the plainly evinced Congressional purpose to use the clause to avoid the payment of the high prices

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before the emergency arose." The 70th Congress enacted the Merchant Marine Act, 1928, 45 Stat. 689, Section 702 of which (45 Stat. 697) authorized the requisitioning of government-aided vessels and provided for the payment of the "fair actual value of the vessel at the time of taking" with the proviso that such fair actual value should not be "*enhanced by the causes necessitating the taking.*" On this provision, the few pertinent materials are H. Rept. No. 1649, 70th Cong., 1st Sess., p. 10 (conference report); 69 Cong. Rec. 7916-7917 (Cong. Davis), 7918 (House debate). In 1935 and 1936, several merchant marine bills were introduced into the 74th Congress (*e.g.*, H.R. 7521, H.R. 7981, S. 2582, S. 3376, S. 3500, S. 4110, S. 4332, H.R. 8555); H.R. 8555 was the only bill to reach debate and it became the Merchant Marine Act, 1936, 49 Stat. 1985. As it was reported to the House of Representatives, H.R. 8555 authorized the requisitioning only of government-aided vessels, and, in that connection, contained an "enhancement" clause in the same terms as the 1928 Act and as finally adopted in the 1936 Act. H. Rept. No. 1277, 74th Cong., 1st Sess., pp. 26, 33. As passed by the House, the requisitioning provisions of the bill were still limited to government-aided vessels, the "enhancement" clause was included, but it was also provided that no more than the ship's cost less depreciation could be paid upon taking. 79 Cong. Rec. 10200. As initially reported to the Senate, H.R. 8555 apparently contained similar provisions. S. Rept. 1226, 74th Cong., 1st Sess. After it had been reported to the Senate, the bill was amended to permit the requisitioning of documented vessels which had not been federally aided, and the "enhancement" clause, in the terms in which it appears in the 1936 act, was made applicable to requisitions of such vessels. 80 Cong. Rec. 9885, 9920-9921, 10077. A different provision, derived from the cost maximum inserted in the bill on the House floor, was made for payment upon the requisitioning of vessels upon which a construction differential subsidy had been allowed (*i.e.*, subsidized vessels), and the bill became law in this form. Sec. 802, 902(b), 49 Stat. 2011, 2016 (All italics supplied).

for requisitioned tonnage which had been paid in World War I compels the construction that the courts were included. In 1939, doubts had arisen as to the statute's validity under the Fifth Amendment because of its use of "fair actual value" in lieu of "just compensation," and the section was amended to read as it now does. 53 Stat. 1255-1256. But it was expressly pointed out, both to the House of Representatives and to the Senate, that the "changes also retain the injunction now carried in section 902 that the value of the property taken and used shall not be enhanced by the causes necessitating the taking and use." H. Rept. 660, 76th Cong., 1st sess., p. 4; S. Rept. 678, 76th Cong., 1st sess., p. 4; 84 Cong. Rec. 6105, 10626. And there is no intimation in the debates or reports that the "enhancement" clause was henceforth to be restricted to the administrative award.[7] The most that can be said is that there may have been some doubt that the clause could validly apply in judicial determinations of just compensation but

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[7] These 1939 changes were suggested by the Maritime Commission, which took the position that retention of the terms "fair actual value" might lead to a holding that the constitutional measure of just compensation had been denied. At the committee hearings, the chairman of the Commission pointed out that the "enhancement" clause was retained, and added:

> It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts.

(Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st Sess., on H.R. 4983, April 27, 1939, p. 10).

there was no deviation from a clear purpose to continue the provision's application to such proceedings, if the Constitution permitted. In the face of this text and legislative history, to restrict the clause to Commission awards, as the Court of Claims did, because of doubt as to its validity when judicially applied, can be no more than formal reliance on the canon that statutes should be construed so as to sustain validity. For here such an interpretation is wholly equivalent to a direct holding of unconstitutionality, since, in this instance, the results of following the canon or of directly disallowing the statute are exactly the same.

3. The validity of the "enhancement" clause is supported by a proper construction of the Fifth Amendment, taken together with Congressional authority under the war power.[8] At least when the

[8] Since the Court of Claims held the clause inapplicable to its own proceedings, it did not canvass the various constructions, current and possible, of the enhanced value excluded by the clause. One interpretation, that of the Comptroller General, is that the clause prohibits the payment of compensation to the extent that it may be based upon values in excess of those existing on September 8, 1939 (the date of the President's proclamation of a limited national emergency), provided that such excess be determined as due to economic conditions directly caused by the national emergency. 22 Comp. Gen. 497, 608. A second construction, announced by the Advisory Board on Just Compensation in December, 1943, (Appendix B, *infra*, p. 36) and since followed by the War Shipping Administration (in this and other cases), and by the Maritime Commission, defines the excluded enhanced value as that "due to the government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect occurred before or after the declaration of the national emergency of May 27, 1941," but not including enhancement due to a general rise in

takings are for war or defense purposes, we believe that Congress has power, within limits, to define the measure of just compensation; and that the particular measure chosen here falls within the bounds of this legislative function. The Court of Claims' contrary view rests on the twin assumptions, first, that the determination of just compensation is solely for the courts, and, secondly, that an award less than the sum the owner could secure from a private purchaser—the "current market price"—cannot constitute just compensation. In our view,

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prices or earnings of merchant vessels, or other commodities or property. A third interpretation, occasionally advanced, is that the clause does no more than incorporate, and goes no further than, the existing judicially developed doctrines of just compensation, especially as recently elaborated in *United States* v. *Miller*, 317 U. S. 369. This third constructi... may be set to one side as plainly contrary to the avowed Congressional purpose to authorize awards substantially less than those allowed by the courts after World War I (*supra*, pp. 13-17), and as out of harmony with the statute's wording and history. The first two interpretations have been forcefully supported and argued continuously since 1943.

Although the Court of Claims did not detail its understanding of the meaning of the clause, it found (R. 12-13) that (a) values of merchant vessels were enhanced between September 8, 1939, and May 27, 1941, by "the demand for vessels which followed the outbreak of war in Europe," (b) such values were enhanced after May 27, 1941 (and particularly after December 7, 1941) by (i) "the government's need for vessels, *which necessitated the taking of many vessels*" (italics supplied), and (ii) "the great increase in shipping and in harbor traffic which occurred during the period of the war." The court concluded that the value of the *MacArthur* had been enhanced by the sum of $5,000 by the date of taking, October 15, 1942 (R. 13). Its opinion (R. 14) and its reference to the Advisory Board's rules (R. 15, 16-17), indicate that the court probably followed the Advisory Board's view in holding that the clause excluded only enhancement attributable to "the government's need for vessels in the prosecution of the war, which necessitated the requisitioning of many of them" (R. 14).

both of these contentions, though finding some support in prior judicial statements, are basically unsound.

a. The Fifth Amendment requires that "just compensation" be paid for all private property taken for public use, but it does not suggest that the federal courts alone are to develop the measures and methods of ascertaining "just compensation." Where Congress has left the determination of just compensation wholly to the courts, as has usually been the case, the judiciary must, of course, decide for itself what compensation the Constitution requires (cf. *United States* v. *John J. Felin & Co., Inc.*, October Term, 1947, No. 17, decided June 14, 1948); but that is not to say that the legislature, when it wills, cannot establish measures and methods which must be tested, not by their consonance with these detailed standards developed by the courts independently of legislative direction, but against the broad constitutional conception of "just compensation" itself. There is nothing in the Fifth Amendment denying to Congress a right, equal to that of the courts, to elaborate the content of "just compensation" in particular circumstances, or forbidding Congress reasonably to differ from the courts as to the proper measure of an award, provided always that the fundamentals of justice and fairness, embodied in the phrase "just compensation," are not violated. Cf. *Al-*

brecht v. *United States*, 329 U. S. 599, 602-603.[9] In developing the governing judicial measures of just compensation, this Court has been quick to mold the rules to conform to its conception of fairness, and has often rejected, because of the demands of equity, merely mechanical or mathematical standards.[10] Since such ideas of equity, justice, and fairness necessarily inhere in a determination of just compensation, we believe that the Constitution does not wholly foreclose Congress,

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[9] In determining the issue of whether property is being taken for a "public use," a requirement which the Fifth Amendment likewise imposes, the settled federal rule is that the legislative declaration is entitled to nearly conclusive weight. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *Barnidge* v. *United States*, 101 F. 2d 295, 298-299 (C.C.A. 8).

Similarly, it is now axiomatic that, in applying the comparable constitutional requirement of no deprivation of property without "due process of law," the courts pay great heed to legislative and administrative determinations. Cf. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 *et seq.* (Brandeis, J., concurring); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *R. R. Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Miller* v. *Schoene*, 276 U. S. 272; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Munn* v. *Illinois*, 94 U. S. 113.

[10] *United States* v. *Miller*, 317 U. S. 369, at 373-377, summarizes the current rules, with great emphasis on the requirements of "fairness"; for instance, the Court states: "Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must *in fairness* be eliminated in a condemnation case . . ." (317 U. S. at 375; italics supplied.) See also, *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, at 279, 280; *United States* v. *Petty Motor Co.*, 327 U. S. 372, at 377-378; *United States* v. *John J. Felin & Co., Inc.*, October Term, 1947, No. 17, decided June 14, 1948.

the primary policy-making organ of the Federal Government, from implementing its own views of adequacy and justice. Legislative standards must, of course, abide by the sovereign conception of the Fifth Amendment, but they should not be thrust aside solely because Congress is their source, or because they depart from the judicially developed rules, which may represent the dominant part of the Constitution's general conception of "just compensation" but surely do not exhaust it.

We recognize that in 1893, in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, the Court stated that the "measure of compensation * * * is a judicial and not a legislative question" and that the "question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation."[11]. But we urge that, in view both of the purposeful adoption by the 1936 Congress of the "enhancement" clause after a long gestation period, and of the great importance of the ques-

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[11] This principle is quoted or paraphrased in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 365, 367. But cf. *Bauman* v. *Ross*, 167 U. S. 548, 569, 573 (upholding a statute requiring offset of benefits to owners' remaining lands).

tion, this *Monongahela* principle be reexamined, and discarded or qualified.[12]

b. The Court of Claims intimates that the vice of the "enhancement" clause lies in its subtraction of a sum from the vessel's current market value. (R. 17). That is concededly the effect of the statute in this and many other cases, but invalidity does

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[12] The *Monongahela* case may not mean anything more, on this point, than that the legislative measure must be subject to some measure of judicial scrutiny. If it does mean that legislative rules of compensation have no place whatsoever, the decision rests solely on an *obiter* quotation from an early concurring opinion of a single justice in a case coming from a state court (McLean, J., in *Charles River Bridge Props.* v. *Warren Bridge Props.*, 11 Pet. 420, 571), and on three state cases, one of which (*Com.* v. *Pittsburgh & C. R. Co.*, 58 Pa. 26, 50) holds no more than that the legislative measure was invalid as entirely unreasonable, another of which (*Penn. Rd. Co.* v. *Balt. & Ohio Rd. Co.*, 60 Md. 263, 269) stands on a unique state constitutional provision, and the third (*Isom* v. *Mississippi Central Rd.*, 36 Miss. 300, 315) adopts a substantive rule regarding consideration of benefits which was later rejected by this Court in *Bauman* v. *Ross*, 167 U. S. 548.

Nineteenth century judicial expressions of the binding nature of legislative measures of just compensation are not lacking. See *McMasters* v. *Commonwealth*, 3 Watts 292, 295 (Pa. 1834) ("As the legislature have the undoubted right to determine when the public interest requires the assumption of private property, so it seems to me the better construction of the constitution, that it shall rest in their wisdom to determine the nature and kind of the compensation to be made, and also to point out the tribunal by whom the amount may be ascertained."); *Fenelon's Petition*, 7 Pa. 173, 175 (1847) ("Compensation must be made when private property is taken for public use, but the mode, manner and *criteria* of amount of that compensation is not a matter for judicial, but by legislative proceeding."); *Chesapeake & O. Canal Co.* v. *Key*, Fed. Cas. No. 2649, 5 Fed. Cas. 563, 564 (C.C.D.C. 1829) ("But the constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority, which should give the power to take private property for public use").

not follow as of course from a failure to award current market value. For instance, the system of judicial rules for determining just compensation requires deductions from current market value for benefits to the owner's remaining property (*Bauman* v. *Ross*, 167 U. S. 548), for value arising from the owner's desire to retain the property or from the taker's special need (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *United States* v. *Miller*, 317 U. S. 369, 375), for increased value resulting from the initiation of the condemnation project (*United States* v. *Miller, supra,* at 376-377), as well as for value attributable to the owner's state-created privilege to use the power of eminent domain (*United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266). In these cases, considerations of equity and fairness have impelled courts to award a condemnee less than he could have secured from "private persons for their own use" (R. 16). In Section 902(a), Congress has determined, in the direct light of governmental experience with requisitioned ships in World War I, that equity and fairness require a shipowner to accept, in times of war or of a national-defense emergency, less than his ship's current market value, to the extent that that value has been "enhanced by the causes necessitating the taking." This measure of compensation—entirely comparable to that adopted in World War II by other com-

belligerent nations—[13] was designed to eliminate war profiteering,[14] and to cut down inflated war-time scarcity prices for vessels urgently needed by the Government, at the same time according the owner fair compensation at normal price levels. *Supra*, pp. 12-17. Congress has thus given its reasonable interpretation of the traditional eminent domain concept of "*fair* market value," which this Court has said denotes what "it fairly may be believed that a purchaser in *fair* market conditions would have given." (*New York* v. *Sage*, 239 U. S. 57, 61), or, on another occasion, "market value *fairly* determined." *Olson* v. *United States*, 292 U. S. 246, 255. See *United States* v. *Miller*, 317 U. S. 369, 374-375. [Italics supplied.] In one sense, what Congress did was to adapt, enlarge, and elaborate

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[13] The British Compensation (Defense) Act, 1939 (2 & 3 Geo. 6, ch. 75, Sept. 1, 1939), provided in Section 4 that "no account shall be taken of any appreciation in the value thereof [*i.e.*, of "vessels, vehicles, or aircraft"] due to the emergency"; the Canadian Compensation (Defense) Act, 1940 (4 Geo. VI, ch. 28, August 7, 1940), provided that "no account shall be taken of any appreciation in the value thereof [*i.e.*, vessels and aircraft] due to the war"; Article 23 of the French law of July 11, 1938 (concerning wartime requisition, *inter alia*) provided that "* * * the indemnities due as a result of requisition shall be calculated by taking account only of the actual loss which the definitive or temporary dispossession imposes on the prestator [*i.e.*, owner] on the day of requisition, exclusive of the profit which the free disposition of the property might procure him, and of any rise in prices produced by speculation or monopoly or any other circumstances imputable to the state of war or of external tension." See Wise, *Requisition in France and Italy* (1944), pp. 13-14, 20, 49-51, 85.

[14] Respondent, for example, invested a total of $8,574.78 in the *MacArthur* (R. 8-9), and the court below awarded him $15,500; this amounts to a profit of approximately 80% after an ownership of seven months.

the judicial "just compensation" rule, recently applied by this Court in *United States* v. *Miller*, *supra*, that the owner is not entitled to the increment of value due to the initiation of the general project for which his property is later taken.[15] Section 902 of the Merchant Marine Act announced, in 1936, that thereafter in times of national emergency the Government's need for vessels might well require the undertaking of a general federal shipping project in which many merchant vessels might be taken, and that, in such event, the owner of a ship which happened to be requisitioned as part of the general project could not claim any increment of value attributable to "the causes necessitating the taking," or the initiation of the general project. Congress was fully entitled, we believe, to mark this measure of award as adequate, reasonable, and fair—as properly the just compensation prescribed by the Constitution.[16]

[15] State just compensation cases applying this rule are *e.g.*, *Dorgan* v. *City of Boston*, 94 Mass. 223, 251; *Benton* v. *Brookline*, 151 Mass. 250, 257-258; *May* v. *City of Boston*, 158 Mass. 21, 29-30; *St. Louis Electric Terminal Ry.* v. *MacAdaras*, 257 Mo. 448, 463-469.

[16] The intrinsic fairness of the "enhancement" clause is attested not only by the similar English, Canadian, and French requisition provisions cited in footnote 13, p. 24, *supra*, but also by the proposals of the (British) Expert Committee on Compensation and Betterment (Uthwatt Committee) in 1941-1942 (1) that all land taken in England for post-war reconstruction be valued by the "standard of 'pre-war values,'" *i.e.*, values as of March 31, 1939, and (2) that the 1919 statutory rules as to compensation for land-takings be amended specifically to provide that "no account shall be taken of any increased value or element of value arising from the actual or possible demands for the land or other land by any government de-

Authority to take this legislative step flows not only from the Fifth Amendment and the general federal eminent domain power, but even more importantly from the Government's war power which vests Congress with full right "to protect the nation against war profiteering" (*United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309; *Lichter* v. *United States*, Oct. Term, 1947, No. 105, decided June 14, 1948), and permits extensive control over the lives, liberties, and properties of men unknown to more normal times. *Lichter* v. *United States*, *supra*, slip sheet opinion, pp. 11-13, 22-25, 35-39; *Bowles* v. *Willingham*, 321 U. S. 503, 517-519. Certainly that power, which has amply sustained the Renegotiation Act (56 Stat. 245, 982; 58 Stat. 78), provides a firm base for the similar legislative declaration that, in time of war or of a national defense emergency, *just* compensation does not include payment for an excess of value stemming from the nation's crisis. "In total war it is necessary that a civilian make sacrifices of his property

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partment, local or public authority, or any statutory undertaker; or arising from the existence of or proposals for, or the probability or possibility of the land or other land becoming subject to, any public scheme of development, redevelopment, or reconstruction (including schemes of preservation from development) or from any works done or to be done or any change of user under any such scheme." See Interim Report (dated 25th April 1941), Cmd. 6291, pp. 4-5; Final Report (dated 14th August 1942), Cmd. 6386, pp. 77-79, 80-81, 86, 103. The proposal as to a March 31, 1939, ceiling on land values was adopted by the British Government in July 1941, and enacted into legislation (for a five-year period) by Section 57 of the Town and Country Planning Act, 1944, 7 & 8 Geo. 6, ch. 47.

and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States*, *supra*, p. 11.

4. The instant case is appropriate for presentation and decision of these important questions of constitutionality and statutory interpretation. Although the Court of Claims did not apply the "enhancement" clause to its own determination, it did make an express finding that the vessel's market value, at the date of taking, was substantially enhanced "due to the demand for vessels which followed the outbreak of war in Europe," "to the government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and harbor traffic which occurred during the period of the war" (R. 12-13). If the "enhancement" clause should properly be considered in the making of the judicial award, some, at least, of this enhancement must be eliminated. The controversy is thus sharp, distinct, and incapable of settlement without resolution of the issues presented here. In view of its holding that the clause was not intended to apply to its proceedings, the court below did not pass upon the question of the proper interpretation of the clause as a substantive rule. See *supra*, pp. 17-18, fn. 8. That question of law is open for decision here, although not fully canvassed below; but it is plainly an issue which will not be determined in the Court

of Claims in succeeding ship requisition cases unless that court is reversed in the instant case.[17] In our view, the importance of the matter to pending litigation makes a determination here of the clause's substantive content preferable to a remand which will elicit no significant new facts or findings bearing on the issue. In any case, if the first two constitutional and statutory questions presented by this petition are decided in favor of the United States, the court below could be directed to determine the remaining issue of the statute's meaning free of the views expressed in its instant opinion.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1948.

[17] Cf. *Wilson Line, Inc.* v. *United States*, C. Cls., No. 46184, decided June 28, 1948.

APPENDIX A

The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, 49 Stat. 1985), as amended by the Act of June 23, 1938, c. 600, sec. 33, 52 Stat. 962, and the Act of August 7, 1939, c. 555, sec. 3, 53 Stat. 1255, 46 U.S.C. 1212, 1242, provide as follows:

SEC. 802. Every contract executed by the Commission under authority of title V of this Act [*i.e.*, "Construction-Differential Subsidy"] shall provide that—

In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Commission, whichever is the greater. Such determination shall be final. In computing the depreciated value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.

The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.

SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of any

vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall

pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

* * * * * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund stablished by section 206 of this Act.

APPENDIX B

Letter of Transmittal and Report of Advisory Board on Just Compensation

Advisory Board on Just Compensation,
Washington, D. C., December 7, 1943.

Dear Admiral Land: We are herewith enclosing our report as the Advisory Board on Just Compensation. In it we have set forth in the form of rules the standards and principles to be observed, in respect of the valuation of vessels requisitioned for title or use by the United States, and in the disposition of matters which have arisen and will arise in connection with the granting of insurance upon and the voluntary chartering of vessels.

In arriving at the conclusions the rules embody we have been greatly aided by the material contained in Document 20, in the hearings before the Bland committee, and by the arguments and briefs filed at the public hearing held on November 26 and 27. Because of the full and exhaustive character of these aids to our deliberations, our labors have been greatly lightened, the time required for them has been shortened, and our confidence in the correctness of the rules we have embodied in our report as our best judgment in the premises has been greatly enhanced.

It seems appropriate to comment briefly on the Comptroller General's ruling of November 28, 1942. Contrary to the impression existing in many quarters, the Comptroller General does not limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the determination of values. The necessity of allowing subse-

quent enhancement that is not directly caused by economic conditions resulting from the emergency is specifically recognized by him. This standard does not necessarily exclude subsequent enhancement which directly reflects the economic changes incident to the improvement in general conditions since 1939.

It is obviously impossible to know without very extensive inquiry into the facts to what extent any enhancement in value was due to that cause, and the order which created the Board confined its duties to the establishing of "standards, rules, and formulae." On this account we did not undertake to consider how far the rules we are submitting would in practice reach different results from the rules recommended by the Comptroller General. It is conceivable that in application the difference might turn out to be far less than has at times been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

We have been greatly impressed not only with the care and consideration which the record discloses that both you and the Comptroller General have given to the matters involved, but with the moderation and judgment exercised by all concerned in endeavoring to work out a solution consistent with the interest of the United States and the justice of the case. In closing we take this opportunity to record our great appreciation of the fact that this has been so.

Respectfully,

(Signed) LEARNED HAND.
(Signed) JOHN J. PARKER.
(Signed) JOSEPH C. HUTCHESON, JR.

ADMIRAL EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the order of the President of October 15, 1943, establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States," establishes "fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered, or insured by the Administration."

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest. Value means value on the American market, not on foreign markets.

Rule 2.—In the case of requisition of foreign-flag vessels under Public L. v 101, just compensation should be determined as in the case of domestic vessels.

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a con-

sideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

Rule 5.—The enhancement clause of section 902(a) of the Merchant Marine Act of 1936, has no application to the valuation of chartered vessels for the purpose of insurance.

Rule 6.—The enhancement clause of section 902(a) has no application to voluntary charters or purchases under Public Law 101.

Rule 7.—In the event of loss due to a risk assumed by the United States in connection with the use of any vessel where no valuation or other mode of compensation has been agreed to, just compensation should be determined on the basis of value on the date of such loss. Where a redetermination or readjustment of rates or values is effected pursuant to the terms of a charter or other agreement, just compensation should be determined as of the date of redetermination. In both cases the determination is subject to deduction on account of enhancement, if any, as hereinabove set out in rule 4.

Rule 8.—Section 902(b) of the Merchant Marine Act of 1936 has no application to vessels merely because they have received mail subsidies under the act of 1928. The section has application only to vessels which have received a construction-differential subsidy under title V of the Merchant Marine Act of 1936; and a mail subsidy is not a construction-differential subsidy within the meaning of section 902(b) of the act.

Rule 9.—Valuations agreed upon by the Administrator and owners are binding, if not in excess of just compensation determined as above prescribed; and settlements should be made on the basis of such valuations with an allowance for any actual loss due to the delay in payment from the

date when such settlements would have been made, if no objections had been raised, not exceeding the current commercial rate of interest.

Rule 10.—Agreements fixing compensation for the title or use of vessels are not binding in the valuation of vessels of owners not parties to the agreements. Such valuations, however, if freely arrived at, may be considered along with other factors as some evidence of value.

LEARNED HAND.
JOHN J. PARKER.
JOSEPH C. HUTCHESON, JR.

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Brief for the U.S.

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No. 132

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

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RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (R. 13–18) is reported at 110 C. Cls. 66.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1948 (R. 18). A motion for a new trial, seasonably filed, was denied on April 5, 1948 (R. 18). The petition for a writ of certiorari was filed on June 29, 1948, and granted on October 11, 1948 (R. 19). The jurisdiction of this Court rests upon the provisions of Section 3 (b) of the Act of February 13, 1925, as amended (now repealed), and upon 28 U. S. C. 1255(1).

QUESTIONS PRESENTED

1. Whether the clause of Section 902 of the Merchant Marine Act, 1936, (the statute authorizing the wartime requisitioning of merchant ships) which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use" undertakes to bind the Court of Claims in determining the just compensation due an owner whose ship was taken under the Act.

2. If so, whether the clause is invalid as denying just compensation, as prescribed by the Fifth Amendment.

3. If the clause is valid and applicable to judicial determinations of just compensation, what is the measure of the enhancement in value required to be excluded from such determinations.

STATUTE INVOLVED

The pertinent portions of the Merchant Marine Act, 1936, as amended, 46 U. S. C. 1242, are set forth in Appendix A, pp. 129–134.

STATEMENT

This is a suit under Section 902 of the Merchant Marine Act, 1936, as amended, to recover the balance of just compensation alleged to be due to respondent from the United States for requisitioning of his steam tug, the *MacArthur*, in October 1942 (R. 1–4). The pertinent facts, as found by the Court of Claims, are as follows:

The *MacArthur*, formerly the *Guthrie*, was built at Baltimore in 1895 for the Coast Guard. It was a small harbor boat used by the Coast Guard in Baltimore harbor, from 1895 to 1939, as a boarding tender or tug to transport immigration, customs, and health officers from the shore to vessels arriving in the harbor (R. 5–6). In the latter part of 1939, the *Guthrie* was transferred from Baltimore to the Coast Guard base at Portland, Maine (R. 7).

In September 1941, a special Board of Survey, appointed by the Coast Guard to ascertain the vessel's condition and to make recommendations regarding her disposition or repair, reported that, under normal conditions and considering the vessel's age, the expense of putting her in operating condition would not be justifiable and the vessel should be placed out of commission, but that, in view of the emergency and the great need for vessels, certain designated repairs should be made so that three or four more years of satisfactory service could be had from the vessel (R. 7–8). However, Coast Guard Headquarters directed that the *Guthrie* be sold to the highest bidder in accordance with regulations (R. 8). The sale was advertised and conducted as an open-market transaction, and sealed bids were requested, but only three were received. Respondent was the highest bidder and, on March 19, 1942, the vessel was sold to him in Maine for the sum of $2,875 (R. 8).

During the period from March 19, 1942 to April 26, 1942, respondent caused certain repairs and improvements to be made to the vessel and purchased additional equipment. He expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had not respondent, who was experienced in performing and supervising such work and tried to keep the costs as low as possible, performed part of the work himself, with the aid of a crew of four. The remainder of the work was performed by a shipyard at Portland (R. 8–9). On April 20, 1942, respondent received, from the Bureau of Marine Inspection and Navigation of the Department of Commerce, a Certificate of Inspection which had been withheld pending completion of repairs on the boiler (R. 8). This certificate designated the vessel as a "towing steam vessel" and permitted it "to navigate for one year, the waters of bays, sounds, rivers and harbors" (R. 8). On April 21, 1942, the Department of Commerce issued a Consolidated Certificate of Enrollment and License authorizing respondent to employ the vessel in the coasting trade for one year (R. 9).

On completion of the repairs and improvements, the *Guthrie* was brought to New York under her own power, and after a few days at an East River pier, was moored at Staten Island, where she remained until taken by the United States. She did not engage in any towing operations or com-

mercial work at any time while in respondent's possession. The vessel's name was changed to *MacArthur* in New York (R. 9).

Late in September, 1942, a naval officer surveyed the *MacArthur* to determine her suitabilty for use on the Navy's Eastern Sea Frontier as a steam-heating plant for heating and pumping fuel oil from oil barges into naval combat vessels. This survey termed the vessel's condition, on the whole, to be "fair to good," estimated her original cost at $45,000 and replacement cost at $56.000, and appraised her present value at $9,000[1] (R. 9–10). On October 15, 1942, the War Shipping Administration requisitioned the vessel pursuant to Section 902 of the Merchant Marine Act of 1936, as amended, and took from respondent the entire ownership, possession, and use of the vessel, her equipment and spare parts (R. 5.)[2] After her requisitioning, the vessel was used by the Navy at the docks of the Eastern Sea Frontier for furnishing steam to heat oil for use in combat vessels (R. 10).

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[1] This appraisal was based on the opinion that the vessel had six years left of useful life, that her value should be depreciated during the remaining useful life at 3.3 per cent per year, and that she was accordingly now worth 19.8 per cent of her estimated cost, or about $9,000; market value was not taken into account in this appraisal (R. 10).

[2] Executive Order 9054, February 7, 1942 ("Establishing a War Shipping Administration in the Executive Office of the President and Defining Its Functions and Duties") (7 Fed. Reg. 837, 3 CFR, Cum. Supp. (1943) pp. 1086–1088) transferred certain powers and functions of the Maritime Com-

The War Shipping Administration determined the amount of $9,000 to be just compensation for the *MacArthur*, and on May 18, 1946, offered that sum to respondent (R. 5). In making this determination, the Administration was guided by the 1941 Coast Guard survey rendered before sale of the vessel to respondent (*supra*, p. 3), by the September 1942 naval survey immediately prior to the requisitioning (*supra*, p. 5), and by the rules established by the Advisory Board on Just Compensation (R. 11).[3] Respondent accepted 75% of the Administration's award ($6,750), and brought this suit under Section 902 of the Act to recover the balance of $20,000, alleged to be the amount respondent was entitled to receive as just compensation, plus interest (R. 4, 5).

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mission under the Merchant Marine Act, including those pertaining to requisition, to the War Shipping Administration. Section 202 of the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 Stat. 481, 501, retransferred these powers to the Maritime Commission as of August 30, 1946.

[3] Executive Order 9387, October 15, 1943 ("Establishing An Advisory Board on Just Compensation and Prescribing Its Functions") (8 Fed. Reg. 14105, 3 CFR 1943 Supp., ch. II, pp. 48–49) established an Advisory Board on Just Compensation, consisting of Judges Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr., to aid in the determination of just compensation to be paid by the War Shipping Administration for requisitioned vessels. The Order provided in part:

"4. The Board, in accordance with the applicable provisions of the Constitution and the laws of the United States, shall establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be

The Court of Claims found that the "fair market value of the *MacArthur* at the time and place of the taking was $15,500.00" (R. 12). There then existed in and about the Port of New York "a rising market and a strong demand for tugs of all types, including the *MacArthur*," but most tug owners were reluctant to sell be-

paid for all vessels requisitioned, purchased, chartered or insured by the Administration. The Board may prescribe such rules, regulations and procedures as it deems necessary or advisable in carrying out its functions.

"5. In determining the amount of just compensation, which should be paid for each vessel, the War Shipping Administration will be guided by the general standards, rules and formulae established by the Board."

The Board heard arguments and received briefs, and on December 7, 1943, submitted to the Administrator of the War Shipping Administration its report, containing the rules for the determination of just compensation which are set forth in Appendix B, *infra*, pp. 136–141.

Executive Order 9611, September 10, 1945 ("Reestablishing the Advisory Board on Just Compensation"), 10 Fed. Reg. 11637 (as amended by Executive Order 9627, September 24, 1945, 10 Fed. Reg. 12113) reconstituted the Advisory Board (consisting of Judges Joseph C. Hutcheson, Jr., and Charles E. Clark, and Justice Irwin Untermeyer) "for the limited purpose of establishing fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned pursuant to the act of June 6, 1941, 55 Stat. 242" [authorizing the requisitioning of foreign merchant vessels "lying idle in waters within the jurisdiction of the United States"].

On October 26, 1945, the reestablished Board, after hearing argument, submitted to the Administrator its report and supplementary rules pertaining to the requisitioning of foreign vessels, set forth in Appendix C, *infra*, pp. 142–149.

cause of the greatly increased business. From August, 1941 to February, 1945, six tugboats were sold on the open market in that area, but none of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment (R. 11–12). The Court of Claims also found (R. 12–13):

> Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7, 1941, the date of the Japanese attack on Pearl Harbor, the rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

> Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect

Judgment was granted for the sum of $15,500, plus interest, less the amount already paid by the United States (R. 13, 18).

The Court of Claims stated, in its opinion, that it was not possible to allocate the $5,000 of "enhanced value" between, first, "the great increase in shipping and harbor traffic due to the war," and, secondly, "the government's need for vessels in the prosecution of the war, which necessitated the requisitioning of many of them"; but it also stated that even if it were possible to make such an allocation, the United States would not be entitled to a deduction from market value on account of enhancement attributable to its need for vessels in the prosecution of the war (R. 14). The court held that just compensation requires the Government to pay the property owner the price he could have secured from someone else, and that respondent could have obtained $15,500 from other willing purchasers.[1] The "enhancement value" clause of Section 902 (a)—the clause which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or

[1] The United States did not, and does not now, contest the finding that on October 15, 1942, respondent could have sold the vessel to other potential purchasers for $15,500.

use"—was held not to be binding on the courts but only on the administrative agency, since the determination of just compensation was said to be solely a judicial function, and that it must be presumed that the Merchant Marine Act was passed with that principle in mind (R. 14, 16, 17).

Since the Court of Claims' opinion indicated that it might have rested on a concession by government counsel that the "enhancement value" clause of Section 902 (a) was not binding, or intended to be binding, on the courts (R. 17), the United States filed a motion for a new trial, in which it was pointed out that it was the Government's position that (a) the "enhancement value" clause of Section 902 (a), properly construed, was binding on the courts, including the Court of Claims, in determining just compensation, and (b) the statute, so construed, was valid and constitutional. This motion for a new trial was denied, without opinion, on April 5, 1948 (R. 18).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the "enhancement" clause of Section 902 (a) of the Merchant Marine Act, 1936, as amended, does not undertake to bind the courts when they are called upon to fix just compensation for vessels requisitioned under that Act, and in failing to hold that the court was

required to determine such just compensation in accordance with the terms of the "enhancement" clause.

2. In failing to hold that the "enhancement" clause of Section 902 (a) of the Merchant Marine Act, 1936, as amended (construed so as to be applicable to judicial determinations of just compensation under that Act) is constitutional and valid.

3. In holding that respondent should recover, on account of the taking of his vessel, the full market value of the vessel as of the time and place of taking, regardless of the amount by which that market value was enhanced by the causes necessitating the taking.

4. In failing to find the sum by which the vessel's market value at the time and place of taking (as found by the court) was enhanced by the Government's need for vessels in the prosecution of the war which necessitated the requisitioning of many of them, and in failing to reduce the amount awarded to respondent by the enhanced sum.

5. In entering judgment for respondent in the amount in which it was entered.

SUMMARY OF ARGUMENT

Section 902 of the Merchant Marine Act, 1936 (as amended in 1939), requires that on requisition of the title or use of an unsubsidized merchant vessel, in times of national emergency or

to promote the national defense, "the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." Our argument is that the latter provision—the "enhancement" clause—is applicable to judicial determinations of just compensation, and not merely to the initial administrative calculation; that it operates to base awards for requisitioned ships on more normal values rather than on war-inflated prices; and that, so applied, it violates no constitutional right or privilege.

I

The "enhancement" clause applies to judicial determinations of just compensation. Section 902 (a) states the limitation in general terms, as a partial definition of just compensation, and without any indication that it is to govern only the administrative proceedings; and Section 902 (d), providing for a judicial determination where the owner rejects the Commission's award, does not purport to alter or exclude the general definition of just compensation contained in subsection (a). In the face of this plain text, it is difficult to conceive that Congress limited the "enhancement" restriction to the administrators, thus largely nullifying its prime purpose to preclude payment of excess wartime values and, at

the same time, discriminating against those shipowners unable or unwilling to go to court. Moreover, the clause's long legislative history shows a dominating Congressional purpose to avoid the payment of the high prices which had been awarded, under the accepted judicial doctrines of eminent domain, for tonnage requisitioned in World War I. And it is especially significant that the clause was taken over bodily, in 1936, from the 1928 Merchant Marine Act and previous requisition proposals (concerning subsidized vessels) in which the "enhancement" restriction was admittedly not limited to the administrative proceeding. In 1939, the statute was amended to substitute "just compensation" for the term "fair actual value," previously used, but the "enhancement" clause was expressly retained, and it was assumed on all sides to govern court proceedings, although there were doubts as to its validity in that connection. Congress even strengthened the status of the clause by specifically characterizing, in Section 902 (d), the measure of compensation to be paid, including the "enhancement" clause, as the "just compensation authorized by this section." Congressional activity in the field of ship requisitions, since 1939, seems to us also to confirm the reading that the restriction in the 1936 and 1939 statutes was designed to be applied by the courts as well as by the administrators.

Both in Congress and outside, there have been doubts—based on previous statements by this Court—as to the validity of extending the "enhancement" clause to judicial just compensation determinations, but the step was taken nevertheless. In these circumstances, we suggest that it would frustrate the whole legislative purpose to construe the clause as inapplicable here solely to avoid an issue of validity.

II

A. The validity of the "enhancement" clause, construed to govern court determinations, is supported by a proper interpretation of the Fifth Amendment, taken together with Congressional authority under the war power. In our view, Congress has power, within reasonable limits, to define the measure of just compensation. There is nothing in the Fifth Amendment suggesting that the federal courts alone are to develop the measures and methods of ascertaining "just compensation"; and since general ideas of justice, equity, and fairness necessarily inhere in the constitutional conception, we believe that the Amendment does not wholly foreclose Congress, the primary policy-making organ of the Federal Government, from implementing its own views of adequacy and justice. The Court has accorded great, if not conclusive, weight to legislative or administrative applications of comparable Constitutional provisions of equally general scope and

similar purpose, and which likewise call for the balancing of interacting policies, and the evaluation of past experience:—"due process of law," "equal protection of the laws," "general welfare," impairment of contracts. In the eminent domain clause itself, the requirement of a "public purpose" for a taking has been similarly treated. And the High Court of Australia, construing the comparable clause of the Commonwealth Constitution empowering Parliament to make laws for "the acquisition of property on just terms," has held that it is for the legislature, within the limits of reason, to fix the acquisition terms it judges to be just.

It is true that in *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 327 (1893), the Court appeared to deny the power of Congress to lay down any rules of just compensation. But that statement, which came at the beginning of the Court's serious consideration of "just compensation" and presumably reflected the then prevailing concern with judicial limitations on legislative authority, did not rest on any theretofore generally accepted principle, nor has it ever been repeated by the Court except in general dictum. We think that this *Monongahela* principle is incorrect and inconsistent with governing constitutional principles, and (like the other branch of that case) it should be reexamined and discarded or qualified.

B. The "enhancement" clause is well within the limits of Congress' power to establish legislative measures of just compensation. The general standard for testing such measures will be found, in our view, in the criteria the Court has used to determine whether state condemnations have violated the property owner's right to just compensation, *i. e.*, whether there has been an "absolute disregard" or "reckless disregard" of the owner's rights, whether he has been prevented "from obtaining substantially any compensation," whether there has been a "gross and obvious" error "coming close to the boundary of arbitrary action." Within these bounds, Congress may decide what is the proper measure of just compensation in particular situations. The Fifth Amendment protects the fundamental right to be free of confiscation, but it does not prescribe any specific measure, amount, or rule, where Congress wills otherwise. This standard for judicial review does not conflict with the just compensation rules elaborated by this Court, for Congress has habitually referred the entire problem of just compensation to the judiciary, and the Court has not had occasion—with the single exception of the *Monongahela* case—to pass upon legislative measures of just compensation. A narrow standard of review, similar to that we suggest, has recently been established by the High Court of Australia for compulsory acquisition legislation under the "just terms" clause of the Australian Constitution.

Whatever event or date be reasonably taken as marking the beginning of the excluded increase in ship-values, the "enhancement" clause cannot be questioned under these general criteria for reviewing legislative measures of just compensation. In the direct light of governmental experience with the purchase and requisition of ships in World War I, Congress has determined that equity and fairness require a shipowner to accept, in times of war or of a national-defense emergency, less than his ship's war inflated market value, so that he may receive fair compensation at normal price levels while the Government can acquire urgently needed vessels for reasonable sums. In a sense, Congress has thus given its interpretation of the traditional eminent domain concept of "*fair* market value," in the same way as the courts have, not infrequently, departed from the standard of current market value because of demands of equity or fairness. From another viewpoint, what Congress did was to elaborate and extend the judicial just compensation rule that the owner is not entitled to the increment due to the initiation of the general project, if his property was probably (but not necessarily) within the scope of the project from the beginning. Cf. *United States* v. *Miller*, 317 U. S. 369, 377. The intrinsic fairness of the Merchant Marine Act's "enhancement" clause is also strongly attested by the comparable measures—excluding value-increases due to the war or the emergency—adopted in World War II by England, Canada, Australia, New Zealand, and

France—each a democratic nation which has long followed the principle of awarding just compensation for requisitioned property.

Constitutional grounding for the "enhancement" clause is found not only in the Fifth Amendment and the general federal eminent domain power, but also in the war power, which vests Congress with the right to protect the nation against war profiteering and authorizes extraordinary controls over life, liberty, and property. The 1942 Congress adopted the Renegotiation Act in order to eliminate contractors' excessive war profits, which would otherwise have been made; the 1936 and 1939 Congresses used the "enhancement" clause to limit excessive prices which would otherwise have to be paid for requisitioned vessels. The war power which sustained the Renegotiation Act (*Lichter* v. *United States*, 334 U. S. 742) should be equally effective in support of this other method of controlling profiteering and limiting war costs.

III

Three major interpretations of the type and measure of the enhanced value excluded by the "enhancement" clause have been advanced. The Comptroller General has ruled that the clause prohibits the payment of compensation to the extent that it may be based upon values in excess of those existing on September 8, 1939 (the date of the President's proclamation of a limited na-

tional emergency), provided that such excess be due to economic conditions directly caused by the national emergency. The Advisory Board on Just Compensation, appointed by the President, defined the excluded enhancement as that "due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable * * *." A third construction, urged by respondent and by many shipowners, is that the clause merely incorporates the conventional just compensation rules, especially the principle that any special value to the taker should not be considered. This third construction may be set aside as plainly contrary to the avowed Congressional purpose to limit awards to levels substantially less than those allowed by the courts after World War II, and as out of harmony with the statute's wording and history. The legislative record is less clear as to the starting point from which Congress intended to exclude enhancement, but we believe, on review of the history, that Congress desired to exclude at least a substantial part of the enhancement accruing during a definite period of tension prior to the actual engagement of the country in war or prior to the proclamation of a full-scale national emergency (which occurred, in World War II, on May 27, 1941).

There is strong support for the Comptroller General's view of excluded enhancement in the

statute's legislative history and in the effect this interpretation will have to fulfill the purpose of Congress. We believe that the Advisory Board's interpretation, which emphasizes the Government's actual need for shipping and which may not differ in result from the Comptroller General's view, should be adopted if the other view is rejected.

IV

In the instant case, the Court of Claims has found $5,000 of enhancement from September 8, 1939 to the date of taking (October 15, 1942) (R. 12–13). On the Comptroller General's view, all of this increase would be deductible. On the Advisory Board's view, certainly a large share would be excluded, and it may well be that, on a proper interpretation of enhancement due "the Government's need for vessels," the entire $5,000 would be excluded, especially since it seems likely from the findings that the increment mainly accrued during the seven months (March–October 1942) respondent held the vessel.

ARGUMENT

The "enhancement" clause of Section 902 (a) of the Merchant Marine Act symbolizes an important Congressional effort, in advance of an actual conflict, to control excessive war profits and to assure the nation in wartime of adequate shipping facilities at fair prices. This effort the

Court of Claims has largely devitalized by its holding that the clause "was not intended to lay down a rule binding on the courts," and its suggestion that the statute would be unconstitutional if it were to be applied in a judicial proceeding to fix just compensation (R. 14, 17). In our view, this decision constitutes a serious misinterpretation of the Merchant Marine Act and a misapplication of the Fifth Amendment's requirement that "just compensation" be paid for a taking of private property for public use. In the field of shipping, the "enhancement" clause has widespread significance since it governs awards both for the taking of a vessel's title and for the requisition of its use (Section 902 (a), (c), *infra*, pp. 132, 133–4),[5] as well as insurance amounts payable by the Government on ships requisitioned for use which are lost or damaged due to a Government-assumed risk and where the parties have not agreed to a valuation of the vessel or other mode of compensation (Section 902 (c), *infra*, pp. 133–4).[6] The decision below totally undercuts

[5] Appendix D contains a listing of the pending cases for awards for requisitions of the title or use of vessels.

[6] Appendix D includes (under "requisitions for title") the pending cases involving insurance claims, on ships requisitioned for use, where the parties did not agree on the vessel's valuation or other mode of compensation, and the ship was then lost. Rule 7 of the Rules of the first Advisory Board on Just Compensation has settled, so far as administrative awards are concerned, the application of the enhancement clause to such insurance claims. *Infra*, p. 140.

the Congressional plan to achieve non-excessive prices for needed war supplies in the single field of merchant vessels. But the constitutional implications of the Court of Claims' decision have even broader significance, casting serious doubt, as they do, on the general power of Congress to define the proper measure of "just compensation" for war requisitioned property so as to exclude inflation of values stemming from the Government's large and pressing needs for supplies and equipment. We believe that power—exercised within reasonable limits—should be sustained.

I

THE "ENHANCEMENT" CLAUSE OF SECTION 902 OF THE MERCHANT MARINE ACT, 1936, APPLIES TO JUDICIAL DETERMINATIONS OF JUST COMPENSATION UNDER THAT SECTION

A. *Text:* The text and legislative history of Section 902 demonstrate that the "enhancement" clause was designed to apply to judicial determinations of just compensation, as well as to the initial administrative award.[7] Section 902 (a)

[7] This issue arises, of course, only if the "enhancement" clause does more than embody the traditional judicially-developed doctrines of just compensation. If the clause adds nothing to the accepted conception of "just compensation," it is wholly unimportant whether it was directed only to the administrators or to the courts as well. However, we show below (point III, *infra*, p. 90) that the clause was designed by Congress to impose limitations not found in the accepted judicial measures of just compensation.

states the limitation in general words, as a partial definition of just compensation, and without any indication that it is to govern only the administrative proceedings.[8] Subsection (d) provides "in all cases" for initial determination and payment of the "just compensation authorized by this section" by the Maritime Commission, and then entitles a dissatisfied owner to accept 75% of the administrative award and to bring suit for "such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor * * *." The latter language, pertaining to the courts, does not purport to alter or exclude the definition of just compensation contained in subsection (a), and it is clear, from the text of the two paragraphs alone, that the measure of compensation was to be the same for the courts as for the Commission. There is no ground for asserting, as some have done, that Congress intended to limit the Commission's awards to something less than just compensation, leaving it for the courts to apply the full constitutional measure; in specific terms, Congress

[8] "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

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designated the administrative awards as determinations of *just compensation*,[9] and a statute could not more plainly indicate the legislative finding that the standards established for the Commission's action embodied just compensation.

Moreover, it is inconceivable that a Congress, intent on precluding payment of excess wartime values (as both text and legislative history show), would have nullified its purpose by directing the "enhancement" restriction solely to the administrators. If that were the statutory design, owners of ships of substantially enhanced value would automatically refuse Commission awards and resort to the courts to procure the additional compensation denied them administratively under the statute. The entire process of administrative determination, expressly required by the Act, would become a meaningless and wasteful effort and the "enhancement" clause a futile gesture.

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[9] Section 902 (d) provides first that "*the just compensation authorized by this section* shall be determined and paid by the Commission as soon as practicable," and then goes on to say that "if the *amount of just compensation determined by the Commission* is unsatisfactory to the person entitled thereto," suit shall be brought in the Court of Claims or the ~~action with such use.~~" (Italics added.)

Section 902 (c), dealing with requisitions for use, provides that, in the absence of agreement on a charter, "the Commission shall pay to such person *on account of just compensation* a sum equal to 75 per centum of such rate of hire * * * and such person shall to be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use." (Italics added.)

On this interpretation, probably the only shipowners to accept the Commission award would be those forced to acquiesce because of their lack of sufficient resources to engage in the necessary litigation; the bringing about of such an inevitably discriminatory effect can hardly be thought to be the Congress' purpose in adopting the "enhancement" clause.

B. *Legislative history:* 1. The legislative history of the "enhancement" clause confirms our reading that the courts were intended to apply the same measure as the Commission.[10] The earliest seed of the "enhancement" limitation seems to have been Section 10 of the Shipping Act of 1916 (Act of September 7, 1916, 39 Stat. 728, 731) which empowered the President to requisition "any vessel purchased, leased, or chartered" from the newly-created United States Shipping Board, and provided for payment of "the fair actual value *based upon normal conditions* at the time of taking * * *"; in case of dispute a board of arbitration was to determine the value (italics added).[11] The italicized phrase was added to the measure at the behest of the Senate Committee of Commerce and adopted by both houses without discussion (H. Rept. 659, 64th Cong., 1st sess., p. 8; S. Rept. No. 689, 64th

[10] At pp. 92–105, *infra*, we further discuss the clause's history, with a view to discovering the measure and content of the excluded enhancement.

[11] This provision was repealed by Section 903 (a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 2016.

Cong., 1st sess., pp. 1, 4; 53 Cong. Rec. 12812–3, 13365–8), but it is not unfair to infer that the rapid upward spiralling of ship prices, which was quite evident by the summer of 1916, prompted the amendment.[12] However, the general ship-requisitioning statutes of World War I, applying to non-Shipping Board vessels, did not carry like provisions (Act of June 15, 1917, 40 Stat. 182, 183; Act of July 1, 1918, 40 Stat. 704, 720; Act of July 18, 1918, 40 Stat. 913, 915; Act of November 4, 1918, 40 Stat. 1020, 1022), and determinations of just compensation for most vessels taken in that war were made under these general statutes. See *infra*, pp. 93–5.

After the war, in 1922, various merchant marine bills were introduced into the 67th Congress (H. R. 10644, H. R. 12021, H. R. 12817), which contained an "enhancement" clause with substantially the present wording ("in neither case shall such fair actual value be enhanced by the causes necessitating the taking"); each of these bills limited the requisitioning powers to vessels which had been owned or financially aided by the Federal Government, and like the 1916 Shipping Act provided for arbitration in case of dispute.

[12] Smith, *Influence of the Great War Upon Shipping* (1919) (No. 9 of the Preliminary Economic Studies of the War of the Carnegie Endowment for International Peace), pp. 31–3, briefly summarizes the steep rise in ship rises in the first years of World War I. See also S. Rept. No. 841, 63rd Cong., 3d sess., pp. 7–8, and H. Rept. No. 1149, 63rd Cong., 3d sess. (on previous Shipping Board bills).

All proposals failed of enactment, but proponents of the "enhancement" clause clearly viewed it as cutting down war-inflated values comparable to those paid in World War I. H. Rept. No. 1112, 67th Cong., 2d sess., pp. 18, 29; S. Rept. No. 935, 67th Cong., 4th sess., pp. 24, 35; 63 Cong. Rec. 97, 367–8. In the 68th Congress, the House of Representatives appointed a Select Committee of Inquiry into Operations, Policies, and Affairs of the United States Shipping Board Merchant Fleet Corporation, which held extensive hearings. This Select Committee, which made its report to the 69th Congress, referred to the "fabulous" prices paid for vessels in World War I, and recommended amendment of Section 10 of the Shipping Act of 1916, *supra*, "so as to clearly and specifically provide that in the event of a future national emergency and the need for such [Shipping Board] ships for national defense, the Government could take them over on the basis of charter rates prevailing before the emergency arose, or at the world market value of such ships before the emergency arose." H. Rept. No. 2, 69th Cong., 1st sess., pp. 31–2, 35. The next significant legislative action was the enactment by the 70th Congress of the Merchant Marine Act, 1928, 45 Stat. 689, Section 702 of which (45 Stat. 697) authorized the requisitioning of government-aided vessels for national defense purposes or during a Presidentially-proclaimed national emergency, and provided for the payment of the "fair

actual value of the vessel at the time of taking," with the proviso that such fair actual value should not be "enhanced by the causes necessitating the taking"; a shipowner dissatisfied with the administrative award could sue the United States under the Tucker Act "for the amount of such fair compensation." 45 Stat. 698. The few pertinent materials again indicate the clear purpose to eliminate "any enhancement because of the emergency" and not to pay high war-time prices. H. Rept. No. 1649, 70th Cong., 1st sess., 9–10 (conference report); 69 Cong. Rec. 7916–17 (Cong. Davis), 7918.

In 1935 and 1936, several merchant marine bills were introduced into the 74th Congress (*e. g.* H. R. 7521, H. R. 7981, S. 2582, S. 3376, S. 3500, S. 4110, S. 4332, H. R. 8555), of which H. R. 8555 was the only one to reach debate, and it became the Merchant Marine Act, 1936, 49 Stat. 1985. As it was reported to the House of Representatives, H. R. 8555 followed the Merchant Marine Act, 1928, in authorizing the requisitioning only of government-aided vessels, and, in that connection, contained an "enhancement" clause in the same terms as the 1928 Act. H. Rept. No. 1277, 74th Cong., 1st sess., pp. 26, 33. As passed by the House, the requisitioning provisions of the bill were still limited to government-aided vessels, but it was also provided that in any case no more than the ship's cost less depreciation could be paid upon a taking. 79 Cong. Rec. 10200. As initially

reported to the Senate, H. R. 8555 apparently contained similar provisions. S. Rept. No. 1226, 74th Cong., 1st sess. After being reported, the bill was amended in the Senate to permit the requisitioning of American documented vessels which had not been federally aided, and the "enhancement" clause, in the terms in which it had been previously used, was made applicable to takings of such vessels. 80 Cong. Rec. 9885, 9920–1, 10077.[13] A stricter provision, derived from the cost maximum inserted in the bill on the House floor, was made for payment upon the requisitioning of vessels for which a construction differential subsidy had been allowed (*i. e.* government-aided vessels). 80 Cong. Rec. 10077. The bill became law in this form, with no further discussion of the requisition provisions. Sections 802, 902 (a), 902 (b), 49 Stat. 2011, 2016, *infra*, pp. 129–131.

Thus, as it was passed in 1936, Section 902 (a) applied to unsubsidized vessels (such as respondent's) the same enhancement clause which had

[13] After H. R. 8555 was reported to the Senate, Senators Copeland, Gibson, and Guffey, who had all introduced other merchant marine bills into the Senate, joined in proposing an amendment to H. R. 8555 (known as the Committee print of June 13, 1936) which was substituted for the version of H. R. 8555 previously reported to the Senate, and was the measure actually considered by the Senate. 80 Cong. Rec. 9885. This June 13, 1936, committee print provided for the requisitioning of unsubsidized vessels.

Senator Copeland's original proposals limited the requisitioning power to subsidized vessels; Senator Guffey's bill extended it to all vessels; each bill contained an enhancement clause governing all takings.

been proposed in 1922, and adopted in the 1928 Merchant Marine Act, with respect to government-aided ships. And, as in 1928, the new statute applied the critical clause both to the administrative award and to the later judicial hearing. Payment of the "*fair actual value*" of requisitioned vessels which had not been subsidized was required, "and in no case shall such fair actual value be enhanced by the causes necessitating the taking" (section 902 (a)); the Commission was to "ascertain the *fair* compensation for such taking or use," and a dissatisfied claimant could sue the United States "for the amount of such *just* compensation." Section 902 (b). [Italics added.] 49 Stat. 1985, 2015–6, *infra*, pp. 130–1. *Mutatis mutandis*, this was the same as the comparable section of the preceding statute, in which the "enhancement" clause was clearly not limited to the administrative proceeding.[14] The sparse

[14] Section 702 of the Merchant Marine Act, 1928, 45 Stat. 689, 697–8, provided:

(a) The following vessels may be taken and purchased or used by the United States for national defense or during any national emergency declared by proclamation of the President:

(1) Any vessel in respect of which, under a contract hereafter entered into, a loan is made from the construction loan fund created by section 11 of the Merchant Marine Act, 1920, as amended—at any time until the principal and interest of the loan has been paid; and

(2) Any vessel in respect of which an ocean mail contract is made under Title IV of this Act—at any time during the period for which the contract is made.

(b) In such event the owner shall be paid the fair actual

legislative history relevant to the extension of the clause, in 1936, to unsubsidized vessels does not indicate that the provision, despite the statutory text, was to be read as inapplicable to judicial proceedings. 80 Cong. Rec. 9885, 9920–1, 10077.[15] On the other hand, the plainly evidenced Con-

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value of the vessel at the time of taking, or paid the fair compensation for her use based upon such fair actual value; but in neither case shall such fair actual value be enhanced by the causes necessitating the taking. In the case of a vessel taken and used, but not purchased, the vessel shall be restored to the owner in a condition at least as good as when taken, less reasonable wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the vessel in such condition. The owner shall not be paid for any consequential damages arising from such taking and purchase or use.

(c) The President shall ascertain the fair compensation for such taking and purchase or use and shall certify to Congress the amount so found by him to be due, for appropriation and payment to the person entitled thereto. If the amount found by the President to be due is unsatisfactory to the person entitled thereto, such person shall be entitled to sue the United States for the amount of such fair compensation and such suit shall be brought in the manner provided by paragraph 20 of section 24 or by section 145 of the Judicial Code, as amended [U. S. C., Title 28, §§41, 250].

[15] Some have read Senator Bone's ambiguous statement at 80 Cong. Rec. 9920–1 as indicating his belief that Section 902 (b) of the 1936 Act permitted a court to disregard the "enhancement" clause, but we believe, rather, that Senator Bone, as well as Senator Clark (who also participated in this phase of the debate) was directing his attack against allowing *de novo* judicial determination of awards for the taking of *subsidized* vessels, and in that connection thought that Section 902 (b), as it then stood (*i. e.* without the initial "except" clause, *infra*, p. 130), opened the door to judicial allowances greater than the depreciated cost of the subsidized vessel.

gressional purpose to use the clause to avoid the payment of the high prices for requisitioned tonnage which had been paid in World War I, compels the conclusion that the courts were included within the scope of the clause. And the semicircular argument that Congress "must have known" of its impotence to establish legislative rules of just compensation binding on the courts, and therefore could not have intended to make the "enhancement" clause applicable in judicial proceedings, is largely answered by the 1936 Act's close following, in this connection, of the 1928 statute, which admittedly raised no such constitutional issue since it dealt solely with subsidized vessels as to which the accepted judicial measures of just compensation would not have to be applied. Doubts as to the validity of making the same provision for unsubsidized ships may have existed, but Congress took the step nevertheless.[16]

[16] Title IV ("Ocean-Mail Contracts) of the Merchant Marine Act, 1936, 49 Stat. 1993-1995, terminated the ocean-mail contracts authorized by the 1928 Act, provided for Commission settlement by agreement (on specific conditions) of claims for such termination, and as an exclusive judicial remedy opened the Court of Claims to suits by contractors who did not settle with the Commission. The court's jurisdiction was "expressly limited to an award of just compensation under the provisions heretofore set forth and such just compensation shall not include any allowances for prospective profits or for speculative future profits that might have been realized by the claimant if permitted further to carry out the contract." In this connection, it is significant that the sponsor of the ocean-mail provisions supported the limitation on the Court of Claims' jurisdiction, although, as he said,

2. In 1939, some question had arisen as to the statute's validity under the Fifth Amendment, because of its use of "fair actual value" in lieu of "just compensation," and the section was amended to read as it now does. 53 Stat. 1255–1256, *infra*, pp. 132–4.[17] But it was expressly pointed out, both to the House of Representatives and to the Senate, that the "changes also retain the injunction now carried in section 902 that the value of the property taken and used shall not be enhanced by the causes necessitating the taking and use." H. Rept. No. 660, 76th Cong., 1st sess., p. 4; S. Rept. No. 678, 76th Cong., 1st sess., p. 4; 84 Cong. Rec. 6105, 10626; Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st sess., on H. R. 4983, April 27, 1939, p. 10. And there is no indication in the debates or reports that the "enhancement" clause was henceforth to be restricted to the administrative award; it was assumed by representatives of the Commission and of the shipowners that the clause governed court proceedings.[18] Indeed, these 1939 amend-

"There is some question as to the right of the Congress in connection with fixing a rule as to recoverable damages when a case gets into court." 80 Cong. Rec. 10070.

[17] By the same amendment, Section 902 was broadened to apply to all vessels owned by citizens of the United States, and not merely those ships documented under the laws of the United States.

[18] These 1939 changes were suggested by the Maritime Commission, which took the position that retention of the terms "fair actual value" might lead to a holding that the

ments to section 902 would have been entirely superfluous if Congress had not intended *all* the just compensations provisions of that section, including the "enhancement" clause, to apply to the courts, since no constitutional issue could possibly arise as to measures of compensation controlling only the Commission, so long as the claimant was free to bring suit to increase an unsatisfactory award. The most that can be said is that there may have been some doubt that the clause could validly apply in judicial determinations of just compensation, but there was no deviation from a clear purpose to continue the provision's application to such proceedings, if

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constitutional measure of just compensation had been denied. At the committee hearings, the Chairman of the Commission (Admiral Land) pointed out that the "enhancement" clause was retained, and added:

"It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts."

(Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st sess., on H. R. 4983, April 27, 1939, p. 10).

At the same hearings, Mr. John J. Burns, representing the American Merchant Marine Institute, which favored deletion or amendment of the clause, said:

"And I would just like to call attention to the fact Admiral Land stated, in his prepared statement, there *may* be some question whether that limitation, to wit—that in awarding just compensation, the *court* shall not take into account the cause of the taking—raises some constitutional question as to whether the limitation is binding on the court."

(Hearings, *supra*, p. 15.) [Italics added.]

the Constitution permitted. Congress even strengthened the status of the clause by expressly characterizing the measure of compensation to be awarded, including the "enhancement" limitation, as "the just compensation authorized by this section." Section 902 (d), *infra*, p. 134.[19]

[19] It has been suggested (notably by former Attorney-General William D. Mitchell, who advised the War Shipping Administration on the "enhancement" clause in 1943) that the omission, in 1939, of the word "such" before "just compensation" in the portion of section 902 (d) dealing with judicial proceedings (*infra*, p. 134), when contrasted with the term "such just compensation," in the comparable portion of section 902 (b) of the 1936 Act (*infra*, p. 130), indicates an intention to free the courts from all concern with the "enhancement" clause. But we hardly believe that this slight change can carry with it, all unnoticed, a fundamental alteration of this magnitude in meaning and application, especially in the light of the reiterated emphasis by Commission and legislators on the continued inclusion of the "enhancement" clause. See *supra*, p. 33 and fn. 18. The change is much more easily explained, if that be necessary at all, by the substitution in the first portion of subsection (d) of "the just compensation authorized by this section" and "the amount of just compensation determined by the Commission" (*infra*, p. 134) for the 1936 phrase "fair compensation" (*infra*, p. 130). If "such" had not been deleted in the latter portion of the paragraph, it might have been taken to refer back to the unsatisfactory (to the shipowner) "amount of just compensation [actually] determined by the Commission." Moreover, the 1936 Act may have needed "*such* just compensation" in order to assure the application of the "enhancement" clause to judicial proceedings, since section 902 (b) (as it then stood) made the clause applicable to administrative proceedings by the unconventional term "*fair* compensation", which might very well differ markedly from "*just* compensation"; in contrast, the 1939 statute (section 902 (d)) incorporates the "enhancement" clause in the opening phrase, "the just compensation

3. Opposing inferences as to Congressional interpretation of the "enhancement" clause's judicial application have been drawn from the action and inaction of Congress in this field, subsequent to the 1939 amendment to the Merchant Marine Act. To the extent that these later legislative materials have any real pertinence to the problem, we believe that they furnish some confirmation of the view that the provision was designed to be applied by the courts as well as by the administrators. The Act of June 6, 1941, 55 Stat. 242 (Public Law No. 101, 77th Cong., 1st sess.) (*infra*, p. 135) authorized the taking of foreign merchant vessels lying idle in United States waters, "*provided*, that just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended." At the Senate hearings on this measure, Admiral Land (the then Chairman of the Maritime Commission and later Administrator of the War Shipping Administration), pointed out to Senator Bailey, Chairman of the Senate Committee on Commerce, that the bill incorporated the "enhancement" clause, and agreed with the chairman's statement that "The American owners, or if we should pass this bill, the foreign owners, would not receive the extraordinary values which

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authorized by this section," which defines the term "just compensation" for the whole paragraph.

have been attached to ships on account of this war and the great many sinkings, but would receive the normal values." Hearings before the Senate Committee on Commerce, 77th Cong., 1st sess., on S. J. Res. 67 and H. R. 4466 (May 1941), p. 25.

The general requisitioning statutes enacted in World War II for the taking of property other than ships (Act of October 16, 1941, 55 Stat. 742; Second War Powers Act, 1942 (Act of March 27, 1942), Titles II, VI, 56 Stat. 177, 181) contained no "enhancement" clauses but simply referred to "fair and just compensation" or "the provision for just compensation in the fifth amendment," and leading legislative sponsors of this legislation indicated that, in their view, Congress could not validly lay down any measures of just compensation different from those traditionally applied by the courts. 88 Cong. Rec. 1778–9 (Cong. Summers). But these general requisitioning statutes did not purport to repeal or alter Section 902, and the Congressional views expressed in the fall of 1941 or the spring of 1942 by legislators not charged with maritime matters do not indicate the purpose or intention of the 1936 or 1939 Congresses regarding ship requisition. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282.

Moreover, an unsuccessful attempt was made late in 1942 to substitute the just compensation provisions of the general taking statutes for the

existing wording of Section 902. After the Comptroller General's initial ruling on the "enhancement" clause (*infra*, pp. 90–92), the Senate Committee on Commerce made this proposal in a report on the pending omnibus maritime bill (S. Rept. 1813, 77th Cong., 2d sess., pp. 3, 8–9, December 4, 1942), but the Congress adjourned without taking action on the omnibus measure, and this particular suggestion was not revived. The committee's discussion of the "enhancement" clause as a distinct limitation on amounts payable for requisitioned ships appears to indicate its then belief that the provision applied both to Commission and to court, and its proposal was a deliberate effort to change that policy.

C. *Conclusion.*—The terms and the legislative history of Section 902 thus combine, we believe, to show the purpose of Congress to apply the "enhancement" clause to judicial determinations of just compensation under that section. The opposing argument—advanced by those opponents who admit that the clause goes further than merely embodying the traditional judicially-developed doctrines of just compensation [20]—rests mainly on the canon that constitutional doubts be resolved by interpretations which do not pose issues of validity. But in this instance, to hold that the Congress intended to restrict the clause to Commission awards, as the Court of Claims did, because of doubts as to its validity when

[20] See fn. 7, *supra*, p. 22–23.

judicially applied, can be no more than formal reliance on that canon. For with Section 902 such an interpretation is wholly equivalent to a direct holding of unconstitutionality, since the results of following the canon or of directly disallowing the statute are exactly the same. There is no middle ground. A holding that the clause does not apply to the courts renders it absolutely without effect, exactly as if it had been held invalid. And such a holding has the further practical consequence of reading the clause entirely out of the statute, since the limitation would be wholly ineffective to achieve the Congressional purpose if it were restricted to the initial administrative award, as Congress must have known.

If Congress imposed the "enhancement" limitation upon the courts, as we think it did, its goal should not be frustrated by the artificial construction that it did not actually do what it intended to and supposed it had done. *Shapiro* v. *United States*, 335 U. S. 1, 31–2. This sound principle was aptly incorporated in one of the early authoritative formulations of the canon as applying to cases where the conflicting interpretations were "equally obvious." *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. Careful application of the canon is particularly important with respect to legislation trenching upon the current

borders of constitutional power, since in such areas Congress is both notably sensitive in its expressions of antipathy to accepted doctrines and hesitant to avow decisive departures. If the canon had been invoked broadly in the interpretation of much of the legislation which Congress has enacted in recent years, the operation and effect of those statutes would doubtless have been far more restricted.

In these circumstances, we suggest that it would be proper to investigate and decide the issue of the "enhancement" clause's judicial application apart from the problems of its validity. Cf. *United States* v. *Sullivan*, 332 U. S. 689, 693–4; *Ludecke* v. *Watkins*, 335 U. S. 160; *Shapiro* v. *United States*, 335 U. S. 1, 31–2. In our view, this statutory issue has a plain solution, but even if it were more difficult, we believe that it should be decided without regard to the more complex constitutional problem which remains to be unraveled.

II

The "Enhancement" Clause is Constitutional

The validity of the "enhancement" clause is supported by a proper construction of the Fifth Amendment, taken together with Congressional authority under the war power. At least when the takings are for war or defense purposes, we believe that Congress has power, within reasonable limits, to define the measure of just

compensation; and that the particular measure chosen here falls within the bounds of this legislative function. The Court of Claims' contrary view rests on the double assumptions, first, that the determination of the measure of just compensation is solely for the courts, and, secondly, that an award less than the sum the owner could secure from a private purchaser—the "current market price"—cannot constitute just compensation. In our view, both of these contentions, though finding some support in prior judicial statements, are basically unsound, and inconsistent with the scope of Congress' war powers as they have been defined by this Court.

A. CONGRESS CAN VALIDLY ESTABLISH MEASURES OF JUST COMPENSATION

1. a. The Fifth Amendment requires that "just compensation" be paid for all private property taken for public use, but it does not suggest that the federal courts alone are to develop the measures and methods of ascertaining "just compensation." Where Congress has left the determination of just compensation wholly to the courts, as has usually been done, the judiciary must, of course, decide the proper award for itself, since in those cases "the Constitution and the statutes do not define the meaning of just compensation" (*United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; cf. *United States* v. *John J. Felin & Co.*,

Inc., 334 U. S. 624);[21] but that is not to say that the legislature, when it wills, cannot establish measures and methods which must be tested, not by their consonance with these detailed standards developed by the courts independently of legislative direction, but against the broad constitutional conception of "just compensation" itself. There is nothing in the Fifth Amendment denying to Congress a right, equal to that of the courts, to elaborate the content of "just compensation" in particular circumstances, or forbidding Congress reasonably to differ from the courts as to the proper measure of an award, provided always that the fundamentals of justice and fairness, embodied in the phrase "just compensation," are not violated.[22]

"Just compensation is a practical conception * * *" (*United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, 641), and in developing the governing judicial measures, this Court has been quick to mold the rules to conform to its ideas of fairness and substantial justice. *United States* v.

[21] "Nowhere in the Constitution, however, is there any definition of 'just compensation'; and its identification both with the principle of indemnity and with an award based on the 'fair value' of the property is purely a matter of judicial interpretation or lawmaking." 1 Bonbright, The Valuation of Property (1937), p. 409.

[22] Cf. *Albrecht* v. *United States*, 329 U. S. 599, 602–603: "But the method used by courts to determine 'just compensation' in an adversary proceeding where the parties have failed previously to agree on its amount is not the exclusive method for determining that question."

Miller, 317 U. S. 369, 373–374–375; *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 280; cf. I Bonbright, The Valuation of Property (1937), p. 409, quoted fn. 21, *supra*, p. 42, and the whole of ch. XVI ("Valuation Under the Law of Eminent Domain"). As recent opinions emphasize, merely mechanical or mathematical standards have often been rejected because of the demands of equity. *United States* v. *Miller, supra*, at 373–377 summarizes the accepted rules, with great stress on the requirements of fairness; for instance, the court underscores the concept of "'*fair*' market value," and points out that "* * * strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must *in fairness* be eliminated in a condemnation case * * *" (317 U. S. at 375, italics supplied). Similarly, *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 279–280, refers to considerations of "equity and fair dealing" in determining proper measures of compensation. See also *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–378; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624. Since such ideas of justice, equity, and fairness necessarily inhere in a determination of just compensation, we believe that the

[7] Hale, *Value to the Taker in Condemnation Cases* (1931) 31 Col. L. Rev. 1, is an example of an extra-judicial discussion of eminent domain rules which clearly discloses the policy factors inhering in the formulation of the doctrines in this field.

Constitution does not wholly foreclose Congress, the primary policy-making organ of the Federal Government,[21] from implementing its own views of adequacy and justice. Legislative standards must, of course, abide by the sovereign conception of the Fifth Amendment (*infra*, pp. 55–85), but they should not be thrust aside solely because Congress is their source, or because they depart from the judicially developed rules, which may represent the dominant part of the Constitution's general conception of "just compensation," but surely do not exhaust it.

b. Peremptory rejection of a legislative definition of just compensation also runs counter to the heed normally given to legislative or administrative applications of comparable Constitutional provisions of equally general scope. For instance, in determining the issue of whether property is being taken for a "public use," a requirement which the Fifth Amendment likewise

[21] "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, 340; cf. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 514–515; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 394; *Olsen* v. *Nebraska*, 313 U. S. 236, 246–247; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305–308–309; *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 357; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 285 (Brandeis, J. dissenting).

imposes, the settled federal rule is that the legislative declaration is entitled to nearly conclusive weight. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *United States ex rel. TVA* v. *Welch*, 327 U. S. 546; *Barnidge* v. *United States*, 101 F. 2d 295, 298–299 (C. A. 8); cf. *Cincinnati* v. *Vester*, 281 U. S. 439, 446.* And, of course, it is now axiomatic that, in applying the related constitutional prohibitions against deprivation of property without "due process of law" and denial of the "equal protection of the laws," the courts pay great deference to legislative and administrative determinations. *Munn* v. *Illinois*, 94 U. S. 113; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 *et seq.* (Brandeis, J. concurring); *R. R. Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Miller* v. *Schoene*,

* It is also the established rule that Congress and the legislatures have a wide choice in picking the tribunal to determine the value of the condemned property—jury, commissioners, court, special boards. *Secombe* v. *Railroad Company*, 23 Wall. 108, 117–118; *United States* v. *Jones*, 109 U. S. 513, 519; *Bauman* v. *Ross*, 167 U. S. 548, 593; *Chicago, B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 244–245; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568–569; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; *Bailey* v. *Anderson*, 326 U. S. 203, 205. Cf. Section 902 (a), (d), *infra*, pp. 132, 134.

276 U. S. 272; *Euclid* v. *Amber Realty Co.*, 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Olsen* v. *Nebraska*, 313 U. S. 236. Specific Congressional definition of the "majestic generalities of the Fourteenth Amendment" has recently even been noted as "a concrete statutory command" for the courts. *Fay* v. *New York*, 332 U. S. 261, 282–283. Likewise, Congress may formulate, within the widest limits, the "general welfare of the United States," of which the first clause of Section 8 speaks. *Helvering* v. *Davis*, 301 U. S. 619, 640–641; *United States* v. *Butler*, 297 U. S. 1, 67.[26]

There is no reason, as we see it, for setting the Fifth Amendment's just compensation provision apart from these other constitutional injunctions. "Just compensation" is of the same order of generality as "public purpose," "general welfare," or "due process of law"; and it is infused with comparable conceptions of fairness to the individual combined with advancement of the public good. Like the other broad phrases, its concrete application calls for the careful weighing of interacting policies, the evaluation of past experience, and the provision of a com-

[26] In a different context, the Court has applied the same principle in ruling that it will not normally disturb legislative findings concerning the effect upon interstate commerce of regulated or prohibited activities. *Stafford* v. *Wallace*, 258 U. S. 495, 520–521; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191–192; *United States* v. *Darby*, 312 U. S. 100, 113–115, 119–121; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 527–528.

plex of specific rules—the usual work of legislatures.[27] To require payment of "just" or "fair" or "reasonable" compensation for a taking necessarily invokes a judgment as to what is "just" or "fair" or "reasonable" in the given circumstances, and there is no recognized constitutional principle—authority aside—which deprives the legislature, if it desires, of the right to make this policy judgment for itself.

c. Section 51 of the Australian Constitution authorizes the Commonwealth Parliament to make laws (among other things) with respect to "(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." It has recently been established as the law of Australia that this provision empowers the Commonwealth Parliament, within the limits of reason, to fix the acquisition terms it judges to be just, and judicial review must be guided by that power. *Minister of State for the*

[27] It is an index of the practical and theoretical difficulties inherent in the conception of just or proper compensation that Great Britain has had to refer the general subject to two expert committees, within a twenty-five year period; and both committees issued detailed reports. See Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918), Cmd. 9229 (the Scott Committee); Interim Report (1941), Cmd. 6291 and Final Report (1942), Cmd. 6386 of the Expert Committee on Compensation and Betterment (Uthwatt Committee) (referred to *infra*, pp. 66, 74–5).

Arnaj v. *Dalziel* (1944), 68 C. L. R. 261, 291 (Starke, J.), 308 (Williams, J.); *Grace Brothers Proprietary Ltd.* v. *Commonwealth*, (1946) 72 C. L. R. 269, 279–280 (Latham, C. J.), 285 (Starke, J.), 289–290 (Dixon, J.), 299 (Williams, J.).[28] Some of the justices of the High Court have distinguished the Australian provision from that of the Fifth Amendment—apparently because such decisions as *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 and *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299 (discussed *infra*, pp. 49–55), have been pressed upon them—as a grant of power rather than a restraint (68 C. L. R. at 291, (Starke, J.), at 294–295 (McTiernan, J.); 72 C. L. R. at 289–291 (Dixon, J.)); but in our view that difference, if it be one, carries with it no difference in the treatment to be accorded by the judiciary to eminent domain legislation. The Fifth Amendment's clause, as Mr. Justice McTiernan of the High Court has noted, "expresses a rule of political ethics akin to that which is recognized by the limitations in s. 51 (xxxi)" (68 C. L. R. at 294–295). We think that, like Australia's, our constitutional structure also contemplates that the determination of what is "just" payment for

[28] For pertinent excerpts from the judgments in these cases, see *infra*, pp. 62–63. Other recent cases on Sec. 51 (xxxi) are *Johnston Frear & Kinghan et al.* v. *The Commonwealth*, (1943), 67 C. L. R. 314; *Australasian United Steam Navigation Co., Ltd.* v. *Shipping Control Board* (1945), 71 C. L. R. 508.

compulsorily acquired property be primarily established by the legislature, if it wishes to exercise the power.

4. We recognize that in 1893, in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, speaking through Mr. Justice Brewer, this Court stated that the "measure of compensation * * * is a judicial and not a legislative question," and that "question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." [*] On this point, the case may mean no more than that the legislative measure must be subject to some measure of judicial scrutiny, and that the particular Congressional measure was thought by the then Court to be entirely unreasonable. 148 U. S. at 328–345. If the opinion does mean that legislative rules of compensation have no place whatsoever, the decision rests solely on an *obiter* quotation from an early con-

[*] The Act of August 11, 1888, 25 Stat. 400, 411, authorized the condemnation, by proceedings in a federal circuit court, of the Company's lock and dam in the Monongahela River, and authorized the proceedings to follow Pennsylvania law, "*Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated * * *." This franchise to collect tolls for the use of the lock and dam had been granted by the state of Pennsylvania. Holding that the *proviso* was not binding on it, the Court disregarded the limitation imposed by the statute. 148 U. S. at 327–328.

curring opinion of a single justice in a case coming from a state court, in which the legislature fixed a specific dollar sum as proper compensation (McLean, J. in *Charles River Bridge Props.* v. *Warren Bridge Props.*, 11 Pet. 420, 571), and on three state cases, one of which (*Com.* v. *Pittsburgh & C. R. Co.*, 58 Pa. 26, 50) holds only that the legislative measure was invalid as entirely arbitrary, another of which (*Penn. Rd. Co.* v. *Baltimore & Ohio Rd. Co.*, 60 Md. 263, 269) stands on a unique state constitutional provision, and the third (*Isom* v. *Mississippi Central Rd.*, 36 Miss. 300, 315) employs the principle of sole judicial competence to adopt a substantive rule (regarding the offsetting of benefits) which was later rejected by this court in *Bauman* v. *Ross*, 167 U. S. 548 (upholding a statute requiring offset of benefits to an owner's remaining lands).[30]

We have been unable to find any material in the debates on the adoption of the Fifth Amendment which is helpful in deciding the correctness of the *Monongahela* principle.[31] Some later

[30] The Company's brief in the *Monongahela* case contained only twelve lines on this point, including a citation of the four cases on which the court relies. Oct. T. 1892, No. 722, Appellant's Brief, pp. 32–33. The Government's brief did not mention the point at all, but argued that the statute's *précisa* (fn. 29, *supra*, p. 49) was substantially a correct measure of just compensation in this instance.

[31] Warren, *New Light On the History of the Federal Judiciary Act of 1789* (1923), 37 Harv. L. Rev. 49, 111 *et seq.*

nineteenth-century state cases and textwriters may have announced similar broad views of legislative impotence, though their attack appears to have been largely directed against attempts by state legislatures to fix actual compensation amounts. *Langford* v. *Commissioners*, 16 Minn. 375, 379–380; *Rich* v. *City of Chicago*, 59 Ill. 286, 292–296; *Tripp* v. *Overocker*, 7 Colo. 72; Mills, Eminent Domain (1879) sec. 85; Smith, Commentaries on Statute and Constitutional Law (1848), sec. 318; p. 471; Cooley, Constitutional Limitations (1868) 563; cf. *Cox & Hill* v. *Cummings*, 33 Ga. 549, 555–559 (Confederate constitution); *Cunningham* v. *Campbell*, 33 Ga. 625, 628 *et seq.* (same). But nineteenth-century judicial expressions of the binding nature of legislative measures of just compensation are not lacking,[22] and Mr. Justice Brewer's principle

gives a general account of this legislative history. We have examined the relevant Annals of Congress without avail.

[22] See *McMasters* v. *Commonwealth*, 3 Watts 292, 295 (Pa. 1834) ("As the legislature have the undoubted right to determine when the public interest requires the assumption of private property, so it seems to me the better construction of the constitution, that it shall rest in their wisdom to determine the nature and kind of the compensation to be made, and also to point out the tribunal by whom the amount may be ascertained."); *Fenelon's Petition*, 7 Pa. 173, 175 (1847) ("Compensation must be made when private property is taken for public use, but the mode, manner and criteria of amount of that compensation is not a matter for judicial, but by legislative proceeding"); *Chesapeake & O. Canal Co.* v. *Key*, Fed Cas. No. 2649, 5 Fed. Cas. 563, 564 (C. C. D. C. 1829) ("But the constitution only provides for the general principle. The means of ascertaining the just compensation

cannot be said to have been crystallized into general acceptance, before the decision of the *Monongahela* case in 1893.

Despite its date, that opinion came at the very beginning of this Court's serious consideration of the "just compensation" clause of the Fifth Amendment; and undoubtedly the Court's

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were left to be decided by the public authority, which should give the power to take private property for public use").

[33] For almost the first century of its existence, the Federal Government normally acquired property, when it resorted to eminent domain, by making use of state legislation and state proceedings (except in the District of Columbia or the territories), or by having the state condemn the property on behalf of the United States. *Kohl* v. *United States*, 91 U. S. 367, 373–374; *United States* v. *Jones*, 109 U. S. 513, 519–520; 1 Federal Eminent Domain (Government Printing Office, 1940) pp. 1–5; cf. *Harris* v. *Elliott*, 10 Pet. 25 (example of condemnation under state law). Some statutes authorizing federal condemnation proceedings for individual projects were passed in the 1870's, and the Federal Government's power to take this step was first challenged and upheld in the *Kohl* case (1876). The initial general statutes relating to federal condemnation proceedings were the Tucker Act of 1887, 24 Stat. 505; the Act of April 24, 1888, 25 Stat. 94, 33 U. S. C. 591 (authorizing condemnation for river-and-harbor purposes); and the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257–8 (general land condemnation act).

There was almost no occasion for this Court to review *state* just compensation matters before the adoption of the Fourteenth Amendment, since the Fifth Amendment did not apply to the states. *Barron* v. *Baltimore*, 7 Pet. 243. After the Fourteenth Amendment became a part of the Constitution, the Court first suggested that, unlike the Fifth Amendment, it did not require just compensation for a taking (*Davidson* v. *New Orleans*, 96 U. S. 97, 105 (1877)), and it was not until 1897 that it was definitively held that the later

molding of the constitutional provision reflected the special concern of the opinion's author and of the bench of that day with judicial limitations on legislative authority. Cf. Corwin, *The Supreme Court and the Fourteenth Amendment* (1909), 7 Mich. L. Rev. 643; Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment* (1922), 20 Mich. L. Rev. 737, 741–753; Jackson, The Struggle for Judicial Supremacy (1941), pp. xvii–xix; Corwin, Court Over Constitution (1938), pp. 197–199; Twiss, Lawyers and the Constitution (1942). The Monongahela doctrine of sole judicial competence to prescribe the measures of just compensation was twice repeated by Mr. Justice Brewer, by way of outright dictum, in *Reagan* v. *Loan & Trust Co.*, 154 U. S. 362, 410 (1894) and *Fairbank* v. *United States*, 181 U. S. 283, 300–301 (1901). But it was almost a quarter of a century before the principle next reappeared in this Court's judgments:—in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304 (1923).[34] The Monongahela principle was thereafter quoted or paraphrased in *United States* v. *New River*

amendment did require such compensation. *Chicago, B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 233–241 (1897); see also *Sweet* v. *Rechel*, 159 U. S. 380, 398–9 (1895) [cf. *Adamson* v. *California*, 332 U. S. 46, 79–80].

[34] Compare *Bauman* v. *Ross*, 167 U. S. 548, 569, 573, 584 (1897), upholding a federal statute (pertaining to the District of Columbia) requiring the offset of benefits to the owners' remaining lands.

Collieries Co., 262 U. S. 341, 343–344; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301, and *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 365, 367–368. But in none of these cases was the statement of the principle at all relevant to the decision, since Congress had not attempted to formulate any measures of just compensation in the statutes there involved. In short, the principle's only effective application, in this Court, has been in the 1893 case in which it was born.[35]

Congress purposefully adopted the "enhancement" clause of Section 902 (a) in 1936, after a long gestation period, and in 1939 it deliberately reaffirmed the provision. *Supra*, pp. 25–35. We urge that this legislative choice be not frustrated by application of a principle which is incorrect and inconsistent with governing constitutional principles. The Monongahela doctrine—which in any case can hardly be said to be deeply embedded in our constitutional jurisprudence—should be reexamined and discarded. "That which seems vain and capricious to one generation may become the wisdom of the next." *Peo-*

[35] In *Norcross* v. *Cambridge*, 166 Mass. 508, 511 (1896), the Supreme Judicial Court refused to invalidate a statute authorizing the payment of interest only from the date of actual taking of possession, although the accepted rule in that state required interest to accrue from the time of the formal paper taking. "We think, however, that the rule cannot be held so far to express a matter of common right that a departure from it by the Legislature in a statute authorizing a taking by eminent domain would render the statute in which it occurred wholly or partly unconstitutional."

ple v. Beakes Dairy Co., 222 N. Y. 416, 428 (Pound, J.); cf. *Klein v. Maravelas*, 219 N. Y. 383, 386 (Cardozo, J.).

B. THE "ENHANCEMENT" CLAUSE IS A PROPER MEASURE OF JUST COMPENSATION

1. *General standard of judicial supervision of Congressional measures of just compensation.*— If Congress can validly establish legislative measures of just compensation, what are the limits of its power? The answer, in so far as this Court is concerned, will be found, we think, in the doctrines which have controlled review, under the Fourteenth Amendment, of state eminent domain cases coming from state courts. In the major cases,[37] while insisting that the Fourteenth

[36] The other point in the *Monongahela* case, *i. e.* that the company was constitutionally entitled to have the value of its franchise considered on a taking, has already been severely limited. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 89–90; *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 264–266; *Louisville Bridge Co. v. United States*, 242 U. S. 409, 421–423; *Omnia Commercial Company v. United States*, 261 U. S. 502, 513–514; *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281, 282. On this phase of the *Monongahela* case, see Edgerton, *The Incidence of Judicial Control Over Congress* (1937), 22 Corn. L. Q. 299, 305–306.

[37] *Chicago, B. & Q. Rd. Co. v. Chicago*, 166 U. S. 226; *Backus & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557; *Appleby v. Buffalo*, 221 U. S. 524; *McGovern v. New York*, 229 U. S. 363; *McCoy v. Union Elevated R. Co.*, 247 U. S. 354; *Roberts v. City of New York*, 295 U. S. 264. Cf. Orgel, Valuation under the Law of Eminent Domain (1936), sec. 8, pp. 37–41.

Amendment requires payment of just compensation for a taking (*Chicago, B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 233–241), the Court has refused to set aside state condemnation judgments as violative of the Due Process clause, unless the owner can show extreme callousness toward his right to a fair payment. In the *Chicago* case (where an award to the railroad of one dollar was upheld), Mr. Justice Harlan said that the Court's inquiry was limited to ascertaining whether the state court's rulings of law were in "*absolute disregard* of the company's right to just compensation," or if they had prevented the company "from obtaining *substantially any compensation.*" 166 U. S. at 246, 247. *Backus* expressly reaffirmed these words of self-limitation (169 U. S. at 565, 575–6, 578) and suggested, in addition, that the award must be "in *reckless disregard*" of the owner's rights before any constitutional issue could be reached. 169 U. S. at 566. *Appleby* v. *Buffalo* confirmed the earlier formulations (221 U. S. at 530–2), as did *McGovern* (which also speaks of a "*disregard of plain rights*") (229 U. S. at 370–1, 373, per Holmes, J.), and the *McCoy* case (247 U. S. at 363, per McReynolds, J.). Mr. Justice Cardozo summarizes the doctrine, in his *Roberts* opinion, as staying this Court's intervention unless the state court's error "*be gross and obvious, coming close to the boundary of arbitrary action.*" 295 U. S. at 277–8. [All italics supplied.]

These standards of constitutional review,[38] hitherto applied to state condemnation decisions, may appropriately be borrowed as criteria for judging the validity of Congressional measures of just compensation.[39] The federal courts certainly owe no greater deference to state courts

[38] *I. e.* (1) "absolute disregard" of the owners' right to just compensation; (2) whether he has been barred "from obtaining substantially any compensation"; (3) "reckless disregard" of the owners' rights; (4) "disregard of plain rights"; (5) a "gross and obvious" error, "coming close to the boundary of arbitrary action."

[39] The *Chicago* line of cases deal with state judicial decisions on just compensation, and not with state statutes, but it is clear that the Court's standard of review applies to general rules of law and measures of compensation, and not merely to individual findings of fact or the specific process of valuation of specific property. The opinions refer to "any rule of law," to "rulings upon questions of law," and to "rulings of law" (166 U. S. at 246, 247; 169 U. S. at 565, 578; 221 U. S. at 531-2-3; 229 U. S. at 371; 247 U. S. at 363; 295 U. S. at 278). Indeed, the *McGovern* case expressly treats the error complained of as a ruling on the "measure of damages," and holds that "if the rulings complained of be taken as universal propositions they present no element of the arbitrary even if they should be thought to be wrong." 229 U. S. at 371, 372. And *McCoy* states: "Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right." 247 U. S. at 363.

In his judgment in *Grace Brothers Proprietary, Ltd.* v. *The Commonwealth* (1946), 72 C. L. R. 269, 291, Dixon, J., refers to Mr. Justice Cardozo's statement in *Roberts* v. *New York*, 295 U. S. 264, which we quote above, in his discussion of judicial review of Commonwealth compulsory acquisition legislation under the Australian "just terms" provision. See, *supra*, pp. 47-49; *infra*, pp. 61-64.

and legislatures than to the Congress, and the Fifth Amendment imposes no more severe restrictions upon the Federal Government than the Fourteenth places upon the states. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 278–9; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156; *Woods* v. *Miller Co.*, 333 U. S. 138, 145. In any area of the law, it would be anomalous to sanction stricter judicial control of federal legislation than of state rules, unless the Constitution expressly required the difference. And it would be doubly anomalous to require closer judicial control of Congressional measures of "just compensation," a subject intimately allied with those other fields in which the Court's supervision has been markedly relaxed in recent years or wholly disavowed.[*]

The tests developed by the Court for state eminent domain seem to us to grasp the solid core of the Fifth Amendment's prescription that just compensation be paid by the public when it requisitions private property. This central conception is that the owner's property must not be confiscated without payment, that the sovereign

[*] Cf., *e. g.*, *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Carolene Products Co.* v. *United States*, 323 U. S. 18, 31–2; *Olsen* v. *Nebraska*, 313 U. S. 236; *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582, 585–6, 599–601; *Demorest* v. *City Bank Co.*, 321 U. S. 36; *East New York Bank* v. *Hahn*, 326 U. S. 230; *Fernandez* v. *Wiener*, 326 U. S. 340; *North American Co.* v. *S. E. C.*, 327 U. S. 686, 707–710; *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 82–5; *Osborn* v. *Ozlin*, 310 U. S. 53, 65–67.

must pay some reasonable award or exchange for the property, that fair compensation be made to the owner. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579–580. But it is no part of the historic concept which the Fifth Amendment incorporates, that the Government must measure this award by any particular standard, be it "market value" or some other. So long as it does not bar the owner from "obtaining substantially any compensation," or act in "absolute" or "reckless disregard" of his interests, or commit a "gross and obvious" error "coming close to the boundary of arbitrary action"—the legislature has power to determine what is the proper measure of "just compensation" in particular situations with which it deals. In short, the Constitution protects the fundamental right to be free of confiscation; it does not prescribe any particular measure, amount, or standard of compensation, but authorizes the Congress, within the bounds of reasonableness, to make those choices.[1]

[1] The debates on the adoption of the Fifth Amendment cast no light on the meaning which the "just compensation" clause was thought to have. See *supra*, pp. 50–51. James Bradley Thayer [1 Cases on Constitutional Law (1895), p. 945] suggests that the pertinent writings of Grotius and other early publicists "bring out the conceptions upon this subject which the framers of our first constitutions entertained." Grotius says, (in general terms which contain no reference to particular measures like "market value"), that in exercise of the power of eminent domain, "compensation from the public funds [should] be made, if possible, to the one who has lost his right," and the "state is bound to make good at public expense the damage to those who lose their property."

This view does not conflict with the just compensation rules and doctrines elaborated by this Court in the past sixty years, since the *Monongahela* case. For the cases that have arisen have not involved any legislative measures or standards different from those developed by the courts, and the Court has not had occasion—with the single exception of the *Monongahela* case—to pass upon such legislative efforts. The rules and standards pronounced by the Court have all been in cases in which Congress has referred the entire problem of just compensation to the judiciary, without establishing any measures of its own. In those cases, the Court has necessarily been free to announce policies and fix its own

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De Jure Belli ac Pacis, Bk. II, ch. 14, sec. 7, Bk. III, ch. 20, sec. 7 (Classics of Int. Law trans. of 1646 ed.). Vattel states that "justice requires that compensation be made to the community or the individual from the public treasury; and if the treasury cannot meet the charge upon it, all the citizens are bound to contribute to it for the burdens of the State should be borne equally by all, or in just proportion." Le Droit des Gens, Bk. I, ch. 20, sec. 244 (1758). Blackstone refers somewhat overbroadly to the "great * * * regard of the law for private property," and says that the sovereign does not act "by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained," which he sums up as "a reasonable price." 1 Commentaries 139 (Chitty's ed. 1866). See generally, on early conceptions of eminent domain, Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1931), 6 Wis. L. Rev. 67; Lenhoff, *Development of the Concept of Eminent Domain* (1942), 42 Col. L. Rev. 596.

measures. *Supra*, pp. 41–42. The difficulties and the perplexities revealed by the corpus of judicial rules of just compensation (1 Bonbright, The Valuation of Property (1937), ch. XVI) strongly suggest the tentative character of these standards. And we think that the Court recently recognized the potential existence of other valid approaches when it said: "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose." *United States* v. *Miller*, 317 U. S. 369, 373–4; cf. *Albrecht* v. *United States*, 329 U. S. 599, 602–3; *supra*, p. 42; *Norcross* v. *Cambridge*, 166 Mass. 508, 511, *supra*, p. 54. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377. If, however, some of the specific rules which have been laid down were intended to bind Congress as well as the courts, we believe that *obiter* assumption of power to have been erroneous—as this entire brief attempts to prove.

We have already pointed out (*supra*, pp. 47–49) the similarity between the "just terms" provision of the Australian Constitution and our "just compensation" clause, and the view recently taken by the High Court on the narrow limits of its reviewing function. *Minister of State for the Army* v. *Dalziel* (1944), 68 C. L. R. 269; *Grace Brothers Proprietary, Ltd.* v. *The Common-*

wealth, 72 C. L. R. 269.* We urge that the judicial orientation in passing upon Congressional measures of just compensation should be the same. A statute should not be set aside because it departs from "the ordinary established principles of the law of compensation for the

* Starke, J. (68 C. L. R. at 291, reiterated in 72 C. L. R. at 285):

"Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men."

Latham, C. J. (72 C. L. R. at 279–280):

"Some criticism of the justice of terms of acquisition of property could often be advanced with some reason. I do not think the terms of s. 51 (xxxi.) entitle the Court to declare a statute providing a general method for the acquisition of property invalid because in particular cases it was possible to devise a more just scheme. The Court should not, in my opinion, hold such legislation to be invalid unless it is such that a reasonable man could not regard the terms of acquisition as being just.

"Justice involves consideration of the interests of the community as well as of the person whose property is acquired * * *."

Dixon, J. (72 C. L. R. at 291–2):

"In deciding whether any given law is within the power [section 51 (xxxi).] the Court must, of course, examine the justice of the terms provided. But it is a legislative function to provide the terms, and the Constitution does not mean to deprive the legislature of all discretion in determining

compulsory taking of property" (68 C. L. R. at 291, 308), or "the provisions of the law are accompanied by some qualifications or some exception which some judges think ought not be there" (68 C. L. R. at 291), or the "Court entertain[s] an opinion that other terms would appear to be

what is just. Nor does justice to the subject or to the State demand a disregard of the interests of the public or of the Commonwealth * * *. Under s. 51 (xxxi) perhaps the test may be whether the provisions might reasonably be regarded as just * * *. Its logic, efficacy or wisdom is not the matter in question. Nor do I think that we are required to test its validity by imagining conditions in which its operation might cease to be just * * *." (See, also, fn. 39, *supra*, p. 57).

Williams, J. (68 C. L. R. at 308, reiterated in 72 C. L. R. at 299):

"I agree with the contention that an Act in order to contain just terms need not necessarily comply in all respects with all the principles of the common law relating to the compulsory acquisition of property."

McTiernan, J. (72 C. L. R. at 295):

"It follows that Parliament has a discretion not only to provide for the acquisition of any property but also to enact the just terms which it thinks fit to be part of any law which it makes in pursuance of this power. In my opinion, if the terms enacted by Parliament might reasonably be regarded as just terms, there is no ground for holding that the law is not a law with respect to the acquisition of property on just terms. The question whether the terms enacted by Parliament might reasonably be regarded as just terms is for the Court to decide. If the Court decides that the terms might reasonably be regarded as just it will not declare the terms unjust and in excess of the power, even if the Court entertained an opinion that other terms would appear to be fairer. The words 'just terms' imply that the terms of acquisition should be just as between the owner of the acquired property and the Commonwealth."

See, also, *supra*, p. 48 and *infra*, pp. 72-3, 76.

fairer" (72 C. L. R. at 295), or "in particular cases it was possible to devise a more just scheme" (72 C. L. R. at 279), or because the Court can imagine "conditions in which its operation might cease to be just" (72 C. L. R. at 292).

2. *The "enhancement" clause and the Fifth Amendment.*[45]—Measured by the general criteria we have just discussed, the "enhancement" clause cannot be questioned. It is wholly reasonable. Plainly, it does not deprive the shipowner of all compensation, nor can it be termed an "absolute or arbitrary or reckless disregard" of his rights. Both the Comptroller General's and the Advisory Board's interpretations (*infra*, pp. 105–113) would normally give the owner a substantial award.[46] In the present case, for instance, the administrative offer of $9,000 (R. 5) was substantially greater than respondent's total investment of $8,574.78 in the *MacArthur* (R. 8–9).

a. The Court of Claims intimates that the special vice of the clause lies in its subtraction of

[45] We do not differentiate, in our discussion of the "enhancement" clause's validity, among the various current interpretations of its scope and content (*i. e.*, the measure of excluded enhancement), because we think the statute valid whichever construction be adopted. In Point III, we discuss the major interpretations, and also point out that each is valid under the constitutional principles we urge to be controlling. See *infra*, pp. 123–4.

[46] The widespread acceptance of the War Shipping Administration's awards of just compensation tends to indicate, at the least, that these awards were not in reckless disregard of owners' rights.

a sum from the vessel's current market value (R. 14). This is concededly the effect of the statute in this and many other cases, but invalidity does not follow from a failure to award current market value. It is old law, even for judicial determinations of just compensation, that "'market value is not a universal test, and cases often arise where some other mode of ascertaining value must be resorted to.'" *Beale* v. *Boston*, 166 Mass. 53, 55.* For instance, the system of judicial rules for determining just compensation requires deductions from current market value for benefits to the owner's remaining property (*Bauman* v. *Ross*, 167 U. S. 548); for increased value resulting from the initiation of the general condemnation project (*United States* v. *Miller*, *supra* at 376–7); and for enhancement "arising from the prospect that the Government" would acquire that very property (*Olson* v. *United States*, 292 U. S. 246, 251, 261). Determinations of current market value must also exclude elements of value arising from the owner's desire to retain the property or from the taker's special need (*United States* v. *Miller*, *supra*, at p. 375; cf. *United States* v.

* This Court's recent characterization of the "so called 'market value'" rule as a "practical standard" from which "in fairness" certain elements of value must be eliminated (*United States* v. *Miller*, 317 U. S. 369, 374, 375) and as a "reasonably satisfactory" measure (*United States* v. *Petty Motor Co.*, 327 U. S. 372, 377) indicates that it is not regarded as sacrosanct. Cf. 1 Bonbright, The Valuation of Property, pp. 412–419, 447–449; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624.

Chandler-Dunbar Co., 229 U. S. 53), as well as value attributable to the owner's state-created privilege to use the power of eminent domain, which would enable it to combine the condemned tract with other parcels for water-power purposes (*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 275–6, 281, 283, 285). In these cases, considerations of equity and fairness have impelled the Court to award a condemnee less than he could probably have secured from "private parties for their own use" (R. 16).[66]

Similarly, in Section 902 (a), Congress has determined—in the direct light of governmental experience with the purchase and requisition of

[66] The High Court of Australia has recently upheld a statute, as taking property on "just terms," which departed from current market price by requiring land to be valued as of January 1st of the year in which it was taken. *Grace Brothers Proprietary, Ltd.* v. *The Commonwealth*, (1946), 72 C. L. R. 269; *supra*, pp. 47–8, 61–4.

The British Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), section 2 ("Rules for the assessment of compensation") laid down, as one of its rules, that "(4) where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is *detrimental to the health of the inmates of the premises or to the public health*, the amount of that increase shall not be taken into account." (Italics added). This clause was suggested by the Scott Committee (fn. 27, *supra*, p. 47) largely in order to bar tenement owners from reaping the extra market value induced by overcrowding, failure to maintain good sanitary conditions, etc. Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918), Cmd. 9229, p. 9.

ships in World War I—that equity and fairness require a shipowner to accept, in times of war or of a national-defense emergency, less than his ship's current market value, to the extent that that value has been "enhanced by the causes necessitating the taking." This measure of compensation was designed to eliminate war profiteering,[47] and to cut down inflated wartime scarcity prices for vessels urgently needed by the Government, at the same time according the owner fair compensation at normal price levels. *Supra*, pp. 25–38; *infra*, pp. 92–103.[48] Congress, it

[47] Respondent, for example, invested a total of $8,574.78 in the *MacArthur* (R. 8–9), and the court below awarded him $15,500 (R. 12); this amounts to a profit of approximately 80% after an ownership of seven months.

[48] In his 1921 Report, as Chairman of the War Industries Board, Bernard M. Baruch said, regarding the rule that "just compensation" is measured by market value (American Industry in the War, 1941 ed., p. 79):

"*In the war, market value was largely created by the Government's emergency, and hence it was not a fair test of just compensation.* If an examination be made into the reasoning behind the proposition that market value is a sound measure of just compensation, it will be found that the principle is based on the economic doctrine prevailing when the rule was first pronounced. This doctrine taught that under the automatic working of the law of supply and demand, 'market value' always tends to become equal to the 'cost of production,' and for this reason market value is a measure of 'just compensation.'

"Adam Smith taught that the iron law of nature would always bring about its balance—things will sell for what they are worth, and they are worth what they will sell for—which, he said, was always in the long run what it cost (including a reasonable profit) to produce them; and he illustrated by a series of examples taken from spheres of life

may be said, has thus given its reasonable interpretation of the traditional eminent domain concept of "*fair* market value," which this Court has said denotes what "it *fairly* may be believed that a purchaser in *fair* market conditions would have given" (*New York* v. *Sage*, 239 U. S. 57, 61), or, on another occasion, "market value *fairly* determined." *Olson* v. *United States*, 292 U. S. 246, 255. See, also, *United States* v. *Miller*, 317 U. S. 369, at 374–5, pointing out that certain elements inherent in a "strict adherence to the criterion of market value" must "be disregarded by the fact finding body in arriving at '*fair*' market value." [Italics supplied]. The use Congress made of the "enhancement" clause, in fixing the measure of the "fair" market value for requisitioned ships, does not differ markedly from the action of some courts (uninstructed by legislation) in refusing to fix market value by boom or depression prices, and insisting on "normal" prices. Cf. Orgel, Valuation Under

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where economic relations were very simple. Whether this principle be generally true or not, it was certainly not true under war conditions. *When a demand in the nature of a war demand—absolute and unabated by considerations of a return in value—enters the field, there is no force tending naturally to adjust the market value to cost of production.* Hence, it was found necessary to go back to the more elemental principle and measure just compensation by its primary cause, *viz.* cost of production, including a reasonable profit. This was the principle adopted by the War Industries Board." [Italics supplied.]

the Law of Eminent Domain (1936), secs. 23, 24." We believe that this Court's principles for reviewing state condemnation cases (*supra*, p. 55–57) would not permit it to overturn such state court decisions, and, by like token, a Congressional standard of the same character should not be set aside.

From another viewpoint, what Congress did was to adapt, enlarge, and elaborate the judicial just compensation rule (recently applied by this Court in *United States* v. *Miller*, 317 U. S. 369, 377) that the owner is not entitled to the increment of value due to the initiation of the gen-

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[49] Boom prices: *Suburban Land Co., Inc.* v. *Arlington*, 219 Mass. 539, 541 ("And, as a test of value, we are not inclined to say that the price which is established artificially and temporarily by booming methods should be regarded as equivalent to the market value which is regulated by the natural laws of supply and demand."); *Kansas City, W. & N. W. R. R. Co.* v. *Fisher*, 49 Kan. 17, 18; *Blincoe* v. *Choctaw, Okla. & W. Ry Co.*, 16 Okla. 286; *Howell* v. *State Highway Dept.*, 167 S. C. 217, 223 ("* * * if the taking be during a period of inflated prices, it would be just as unfair to the condemnor to fix the value as of that exact period.")

Depression prices: *United States* v. *Inlots*, Fed. Cas. No. 15, 441a (C. C. S. D. Ohio), 26 Fed. Cas. at pp. 490, 494–5 (jury not to take account of "a temporary depression and stringency of the money market"), affirmed *sub nom. Kohl* v. *United States*, 91 U. S. 367; *Howell* v. *State Highway Dept.*, 167 S. C. 217, 223 ("It would be manifestly unfair to the owner if the taking of the property be during a period of deep depression to fix the value as of that exact date").

There are, of course, many decisions distinctly to the contrary. See *Alishausky* v. *MacDonald*, 117 Conn. 138, 141–2, the war requisition cases cited in fn. 68, *infra*, p. 93; and the other cases cited in Orgel, *op. cit. supra*, secs. 23–25.

eral project, if his property was probably—but not necessarily—within the scope of the project from the beginning. And the excluded increment in value consists not only of the enhancement due to the probability that the condemnor will take that particular property, but also of the increase "calculated on the theory that if they [*i. e.* the plaintiff's lands] had not been taken they would have been more valuable by reason of their proximity to the land taken," on which the Government had erected the improvement. 317 U. S. at 376, 379.[30] In effect, Section 902 of the Merchant Marine Act announced, in 1936, that thereafter in times of war or of national emergency (as had been true in World War I) the Government's need for a pool of vessels to transport men and supplies would probably require the undertaking of a general federal shipping project, in which many merchant vessels might be taken and others used while still in private hands, and that, in such event, the owner of a ship which happened to be requisitioned as part of this "general project" could not claim any increment of value attributable to the actual or prospective initiation of the "pool project." The statute would serve, on this view, to eliminate any increase in value or market price flowing from or due to the Gov-

[30] State just compensation cases applying this rule are, *e. g. Dargan* v. *Boston*, 94 Mass. 223, 251; *Benton* v. *Brookline*, 151 Mass. 250, 257–258; *May* v. *Boston*, 158 Mass. 21, 29–30; *St. Louis Electric Terminal Ry.* v. *Mac Adaras*, 257 Mo. 448, 463–469.

ernment's general need of vessels to carry on the war or to further the national defense, as well as from the Government's compulsory takings, actual or prospective.[51] Congress was fully entitled, we believe, to mark this measure of award (an extension of an accepted judicial rule) as adequate, reasonable and fair—as properly the just compensation prescribed by the Constitution.

b. The intrinsic fairness of the "enhancement" clause is attested not only by these theoretical justifications but by the comparable measures adopted in World War II by others of the democratic combatants, which have long followed the principle of awarding just compensation for requisitioned property. The British Compensation (Defense) Act, 1939 (2 & 3 Geo. 6, ch. 75, Sept. 1, 1939) provided in Section 4 that "no account shall be taken of any appreciation in the value thereof [*i. e.* of "vessels, vehicles, or aircraft"] due to the emergency." The Canadian Compensation (Defense) Act, 1940 (4 Geo. VI, ch. 28, August 7, 1940), provided that "no account

[51] Respondent certainly knew, when he bought the *Mac Arthur* in March 1942 (R. 8), that such a "general shipping project"—including not only actual requisitions but the full use of all available private vessels—had been begun well before the attack on Pearl Harbor, and that the ship market did (and would) progressively reflect the existence and course of the "project." His own vessel was unlikely to be taken, as the court found (R. 13), but he must have known that its market value was and would be further enhanced by the Government's general shipping activity. See *infra*, pp. 124–127.

shall be taken of any appreciation in the value thereof [*i. e.* vessels and aircraft] due to the war." New Zealand's Shipping Requisitioning Emergency Regulations, 1939, Amendment No. 1 (November 29, 1939) provided that the price to be paid for a vessel the title of which was requisitioned "shall be the fair market value thereof at the date of acquisition together with any special value to the owner due to the use made by him of the vessel but excluding any enhancement of value arising from war conditions and their effect on the market, and excluding also any consideration of special value due to the fact that it is a component of a fleet or service" (Statutory Regulations 1939, p. 1004).[52] The Australian "Basis of Compensation Order" (issued under Regulation 60 H of the National Security (General) Regulations) provided that in computing an award for interests in land "no account shall be taken of any appreciation of values due to the war," and, in another connection, excluded "any increase in rental value attributable to the war."[53]

[52] These regulations were adopted under the Emergency Regulations Act, 1939 (September 14, 1939), 3 Geo. VI, 1939, No. 8, Section 3 of which grants power to make regulations "authorizing the acquisition, on behalf of His Majesty, of any property" and "authorizing the taking of possession or control, on behalf of His Majesty, of any property or undertaking."

[53] The Australian Basis of Compensation Order was invalidated by the High Court as failing to provide the "just terms" required by section 51 of the Australian Constitution (*supra*, pp. 47–8, 61–4), but the war "enhancement" clause,

Article 23 of the French law of July 11, 1938 (concerning wartime requisition, *inter alia*) provided that "* * * the indemnities due as a result of requisition shall be calculated by taking account only of the actual loss which the definitive or temporary dispossession imposes on the prestator [*i. e.* owner] on the day of requisition, exclusive of the profit which the free disposition of the property might procure him and of any rise in prices produced by speculation or monopoly or any other circumstances imputable to the state of war or of external tension." Journal Officiel, July 13, 1938, p. 8330; Wise, Requisition in France and Italy (1944), pp. 13–14, 20, 49–51, 85.[54]

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referred to above, was not the ground for the invalidation. *Minister of State for the Army* v. *Dalziel*, 68 C. L. R. 261 (1944); *Minister of State for the Army* v. *Pacific Hotel Pty Ltd.*, noted at 68 C. L. R. 310 (1944). Only two of the five justices discussed the "enhancement" clause (Latham, C. J. and Starke, J., who dissented from the general invalidation of the Order), and both apparently thought it clearly valid. 68 C. L. R. at 293, 310–2. Starke, J. commented: "Again, the direction that no account shall be taken of any appreciation of values due to the war is also, I suppose, a provision to which exception is taken [by counsel for the owner]. *But that kind of provision has been common in Compensation Acts for many years and there is nothing unreasonable or unjust about it.*" 68 C. L. R. at 293. [Italics supplied.]

[54] A previous French law on the general organization of the nation for time of war contained a similar provision concerning "an increase of prices illicitly brought about by speculation or the cornering of the market or by other circumstances imputable to war." See H. Doc. 163, 72d Cong., 1st sess., pp. 878–9.

In World War I, the British Defense of the Realm (Ac-

Also significant in this connection are the proposals of Great Britain's Expert Committee on Compensation and Betterment (the Uthwatt Committee) in 1941–1942. The Committee proposed (1) that all land taken in England for post-war reconstruction be valued by the "standard of 'pre-war values,'" *i. e.*, values as of March 31, 1939, and (2) that the 1919 statutory rules as to compensation for land-takings [Section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919] be amended specifically to provide that "no account shall be taken of any increased value or element of value arising from the actual or possible demands for the land or other land by any government department, local or public authority, or any statutory undertaker; or arising from the existence of or proposals for, or the probability or possibility of the land or other land becoming subject to, any public scheme

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quisition of Land) Act, 1916 (December 22, 1916), 6 & 7 Geo. 5, ch. 63, provided that in determining the amount of compensation for land compulsorily acquired for war purposes, "the value of the land acquired shall be taken to be the value which the land would have had at the date [of taking] if it had remained in the condition in which it was at the commencement of the present war, without regard to any enhancement or depreciation in the value which may be attributable directly or indirectly to any buildings, works, or improvements, erected, constructed, or made on, over or under the land, or any adjoining or neighbouring land for purposes connected with the present war wholly or partly at the expense of the State, or, with the consent of the occupying department, at the expense of any person not being a person interested in the land * * *" (Schedule, par. 6).

of development, redevelopment, or reconstruction (including schemes of preservation from development) or from any works done or to be done or any change of user under any such scheme." See Interim Report (dated 25th April 1941), Cmd. 6291, pp. 4–5; Final Report (dated 14th August 1942), Cmd. 6386, pp. 77–79, 80–81, 86, 103.[55] The proposal as to a March 31, 1939, ceiling on land values was adopted by the United Kingdom Government in July, 1941 (119 Parliamentary Debates, House of Lords, 849–850), and enacted into legislation (for a five-year period) by Section 57 of the Town and Country Planning Act, 1944, 7 & 8 Geo. 6, ch. 47, sec 57.

In view of these English, Canadian, New Zealand, Australian, and French requisition provisions, and of the Uthwatt's Committee's proposals, it seems impossible to us to say that fairness or justice or reason ordains that the current war-inflated market price must be paid to an owner whose goods are taken by the state. These nations have had conceptions of eminent domain similar to ours, and they have been equally intent upon giving just compensation. High authority

[55] The second recommendation is highly relevant to the conception of the Merchant Marine Act, 1936, as revealing, in embryo, a "general federal shipping project" (*supra*, pp. 69–71), for it proposes the elimination of all enhancement due to "*possible* demands" for land by a government agency, or due to the "*existence of or proposals for, or the probability or possibility*" of any Governmental land development scheme. [Italics supplied.]

admonishes that examples such as these cannot be set aside in any judgment of the reasonableness or basic fairness of legislation. Holmes, J., dissenting in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 570–1; Stone, J., dissenting in *Ribnik* v. *McBride*, 277 U. S. 350, 370–372; Stone, J., dissenting in *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 453–4; Brandeis, J., in *O'Gorman & Young, Inc.*, v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257–8; Hughes, C. J., in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 390–1, 399; Cardozo, J., in *Klein* v. *Maravelas*, 219 N. Y. 383, 386.[56]

c. It is true that application of the "enhancement" clause might well contravene the principle, broadly stated by the Court since the early 1920's, that just compensation "means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Brooks-Scanlon Corp.* v.

[56] Cf. Mr. Justice Starke's comments (quoted in fn. 53, *supra*, pp. 72–73) pointing out that war enhancement clauses have been "common in Compensation Acts for many years" and are neither unreasonable nor unjust, and Mr. Justice Dixon's remark, *à propos* of the validity of an Australian compulsory-taking statute: "It will therefore be of some help, when the justice of the terms provided by Commonwealth legislation is in question, to see how other British legislatures have regarded the same matter." *Grace Brothers Proprietory Ltd.* v. *The Commonwealth* (1946) 72 CLR 269, 291; see *supra*, pp. 61–64.

United States, 265 U. S. 106, 126; *Phelps* v. *United States*, 274 U. S. 341, 344; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 373. But even with respect to judicial rules of just compensation, where Congress has not spoken, it has been cautioned that this principle is true only in the sense that the owner is to receive the value of the interest taken, whatever that may be. *United States* v. *General Motors Corp.*, 323 U. S. 373, 379. And, as Mr. Justice Rutledge recently noted (*United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, 648), this principle is in conflict with the accepted rule against award of consequential damages (*United States* v. *General Motors Corp., supra* at 382; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–2; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378), including even the total destruction of a business. *Mitchell* v. *United States*, 267 U. S. 341; *Bothwell* v. *United States*, 254 U. S. 231.

Inconsistent as it is with important judicial rules of just compensation, the *Seaboard* principle should have still less significance when Congress has laid down the governing measure. In such a case, the appropriate principle, as we have argued, is supplied by the decisions reviewing state condemnations and gives much greater heed to the legislative judgment. *Supra*, pp. 55–57. Here, Congress had before it the documented history of shipping prices in World War I, and the

excessive awards required by the traditional rules of just compensation. *Supra*, pp. 25–38; *infra*, pp. 92–103. With this history in mind, it has in effect declared that the wartime ship owner should not be kept, upon requisition, in the same pecuniary position which the existing rules might allow him, because that exalted position rests on a gratuitous combination of scarcity of vessels with extreme and pressing need on the part of the warring world. Corollary theorems are, first, that the public should not be forced to bear the excess of price due to this combination, at great expense to itself and (in general) with a very large profit to the owner; and, secondly, that in these circumstances, it would not be unjust to pay the owner the price he could have gotten prior to the war shipping emergency, adjusted to reflect the price he would presumably have gotten after the emergency's end. These reasonable considerations are not very far, it seems to us, from those which moved Congress to require refunds of excessive profits by war contractors (Renegotiation Act, 56 Stat. 245, 982, 57 Stat. 347, 564, 58 Stat. 78, 59 Stat. 294), so that large and unfair burdens would not be imposed on the public, at the same time that individual contractors were piling up inordinate gains. Nor was Congress' mode of thinking on ship requisitions far from the prime purpose of the eminent domain power to enable the Government to secure necessary supplies, when it needs them, without compulsion to pay

undue amounts. I Bonbright, The Valuation of Property (1937) 408. Private parties, goaded by the probabilities of high profits, might well be willing to suffer excessive prices, but the theory of the Fifth Amendment is that the public, whose spur is less ponderable, should not be forced into that kind of competition.[57] Well within the basic motions delimiting the power of condemnation, Congress decided that it would not be unjust to shipowners to deprive them, at behest of the Government, of the peaks of the wartime shipping market. We submit that this legislative judgment should not be reversed by the Court.

d. Respondent intimates—and others have made the same claim—that Section 902 invalidly discriminates against shipowners, since the general wartime requisition statutes contain no enhancement clause (Br. in Opp. pp. 6–8) (Act of October 10, 1940, 54 Stat. 1090, Act of October 16, 1941, 55 Stat. 742; Second War Powers Act, Titles II, VI, 56 Stat. 177, 181). But "unlike the Fourteenth Amendment, the Fifth contains no equal

[57] It is hard to believe, for instance, that the Constitution would protect the increased prices of food-dealers after a calamity which destroyed a large part of a community's food supply, or in time of disaster would petrify the control over prices exercised by any group selling necessities. At the hearing before the first Advisory Board on Just Compensation, in November 1943 (fn. 3, *supra*, pp. 6–7), Judges Hand and Hutcheson presented such examples as indicating that the just compensation requirement was probably flexible, though they did not state a definitive opinion at that time. See *infra*, fn. 92, p. 124.

protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank* v. *United States*, 317 U. S. 325, 337–8, and cases cited; *Hirabayishi* v. *United States*, 320 U. S. 81, 100. Any legislative classification which is not so arbitrary as to deny due process is therefore valid, and the Due Process clause, as the Court has noted, imposes "restraints less narrow and confining" than the Equal Protection clause of the Fourteenth Amendment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

In its requisition legislation, Congress singled out shipping because World War I experience demonstrated that this type of private property was at once the most necessary for war purposes and the most likely to skyrocket in price.[58] *Supra*, pp. 25–38; *infra*, pp. 92–103. Experience with land and other commodities had not appeared as devastating. "[A] statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see." *Keokee Consolidated Coke Co.*, v. *Taylor*, 234 U. S. 224, 227; *Hirabayishi* v. *United States*, 320 U. S. 81, 100; *United States* v. *Petrillo*, 332 U. S. 1, 8–9. "If a class is deemed to present a conspicuous example of what

[58] This foresight was amply confirmed by the actual experience of World War II. See Sherwood, Roosevelt and Hopkins (1948), *passim*.

the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160–1. As it has done here, the legislature may properly begin with the particular field which in its judgment most needs control.[59] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 471–2. Certainly, nothing prevents Congress from directing its legislation at one industry rather than another, or than all occupations or commodities, where it believes that the chosen industry needs special regulation—or, for that matter, special benefits.[60] *United States* v. *Petrillo*, 332 U. S. 1, 8–9; *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; cf. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584. A clear example, in a comparable legislative field, is the Renegotiation Act which

[59] Congress has often imposed special profit-limitations on the related shipbuilding industry. Section 505 (b) of the Merchant Marine Act, 1936, 49 Stat. 1985, 1998, limited profits on contracts for construction of subsidized vessels to 10%. During the defense and war periods, statutes restricted fees on cost-plus-fixed-fee shipbuilding contracts with the Maritime Commission to 7%. Act of May 2, 1941, 55 Stat. 148: Act of June 16, 1942, 56 Stat. 370.

[60] The "enhancement" clause of section 902 is but one part of a statute (the Merchant Marine Act, 1936) which confers upon the shipping industry many benefits, aids, and protections which have not been provided for other industries.

was limited to war contractors, because Congress believed that they were most likely to make excessive profits, although the concensus would now be that many non-war contractors, wholesalers, and retailers made over-generous profits, on account of war conditions, which were not siphoned off by the excess profits tax.[61]

3. *The "enhancement" clause and the war power.*—Authority to enact the "enhancement" clause of Section 902 flows not only from the Fifth Amendment and the general federal eminent domain power, but perhaps even more importantly from the Federal Government's war power, which vests Congress with full right "to protect the nation against war profiteering" (*United States* v. *Bethlehem Steel Corp,* 315 U. S. 289, 305, 309; *Lichter* v. *United States,* 334 U. S. 742, 754–769, 778–783), and permits extensive control over the lives, liberties, and properties of men, unknown to more normal times. *Lichter* v. *United States, supra; Bowles* v. *Willingham,* 321 U. S. 503, 517–519; cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 405–406. That power, which has amply sustained the Emergency Price Control Act (56 Stat. 23, 765) and the Renegotiation

[61] The established rules permitting the legislature to choose the evils to be remedied are fortified, in this instance, by the fact that Congress was apparently reluctant, at the time it adopted the general requisitioning acts, to make any change from the accepted judicial rules of just compensation, because of a fear that any alteration would be unconstitutional. *Supra,* pp. 37.

Act, provides a firm base for the similar legislative declaration that, in time of war or of a national defense emergency, *just* compensation does not include payment for an excess of value stemming from the nation's crisis.[82]

As *Lichter* points out, "in war both the raising and the support of the armed forces are essential. Both require mobilization and control under the authority of Congress," and, especially "with the advent of such [total global] warfare, mobilized property in the form of equipment and supplies became as essential as mobilized manpower." 334 U. S. at 754–755. One of the prime tools available for this mobilization of property is the Government war contract, and Congress—informed by the experience of World War I and the previous wars in which we have engaged—enacted a far-reaching system of supervision of war contractors' profits. The Court has now established that the war power authorizes this legislative control, even as to agreements antedating the passage of the Renegotiation Act. *Lichter* v. *United States*, 334 U. S. 742; *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841. Another significant tool is the requisition power (334 U. S.

[82] Cf. *Coffman* v. *Federal Laboratories, Inc.*, C. A. 3d, No. 9545, decided November 9, 1948, upholding under the war power the provision of the Royalty Adjustment Act, 56 Stat. 1013, requiring the courts to take into "account the conditions of wartime production" in fixing "fair and just compensation" to be paid to a patent licensor for use of his invention on behalf of the United States.

at 754–756, 765; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309); and in the case of those most essential of war supplies, merchant ships, Congress—here, too, as a result of World War I experience—knew that the taking power would probably be essential to secure a sufficient pool of vessels for the country-at-war; accordingly, Congress took care, throughout the 1920's and 1930's, to provide the Government with dormant requisitioning authority. And just as the 1942 Congress knew that excessive profits would be made by war contractors if some control measure were not adopted, so the 1936 and 1939 Congresses foresaw that excessive prices would have to be paid, in time of war, for requisitioned ships, if the traditional rules applied in the last war were again followed. With precisely the same aim as it had in creating the renegotiation mechanism for war contracts, Congress adopted the "enhancement" clause for requisitioned ships. We can see no reason why the war power, so effective in the one instance, should be powerless in the companion. The rights of the property owner should be no more immune from the war power than the rights of producers or business organizations, or the lives of drafted men. 334 U. S. at 754–758, 779–782.

We may even assume that the "enhancement" clause imposed certain deprivations on shipowners. The same was true of war contractors, subject not only to renegotiation but to priority,

price-fixing, and allocation requirements. Cf. *Yakus* v. *United States*, 321 U. S. 414; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 405–6. It is in the nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." 334 U. S. at 754.

4. *Foreign vessels:* Respondent is an American citizen and his vessel was requisitioned under Section 902 of the Merchant Marine Act, 1936 (R. 1, 5). His case can present no issue as to the application of the "enhancement" clause to *foreign-owned* vessels taken under the Act of June 6, 1941, 55 Stat. 242 (*supra*, pp. 36–37. *infra*, p. 135). Cf. *Skiriotes* v. *Florida*, 313 U. S. 69, 72–4. He has raised the point, however (Br. in Opp., pp. 17–19), and a substantial number of the just compensation suits now pending concern such vessels. In these circumstances, it may be well to sketch the Government's views on the matter.[23]

The 1941 statute empowered the President, during the period of the national emergency but not after June 30, 1942, "to purchase, requisition, for any period during such emergency charter, or requisition the use of, or take over the title to,

[23] The Comptroller General has ruled that the clause is applicable to takings of foreign vessels under the Act of June 6, 1941. 22 Comp. Gen. 1025 (May 11, 1943).

or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended * * *." In addition to the statutory and constitutional defenses raised by all shipowners, foreign and domestic, against effective application of the "enhancement" clause in judicial proceedings, the owners of foreign ships make two special claims: (i) that the "enhancement" clause is not a provision of Section 902 which is "applicable" to takings of their vessels, because it is said to violate recognized principles of international law, if construed as other than a restatement of traditional judicial just compensation rules, and (ii) the related defense that the clause should be read, in the case of foreign ships, so as to conform to these accepted international law principles. We can agree with neither claim.

a. The legislative history of the 1941 statute seems to us to require that the enhancement clause be given the same effect in requisitions of foreign vessels as it has for American ships. The House and Senate reports simply refer to Section 902 of the Merchant Marine Act as providing the

just compensation to which the foreign owners will be entitled. H. Rept. No. 440, 77th Cong., 1st sess., p. 7, S. Rept. No. 277, 77th Cong., 1st sess., H. Rept. No. 520, 77th Cong., 1st sess. (Conference report). In the Senate, Senator Bailey (Chairman of the Committee on Commerce) summarized Section 902 (a) (without mentioning the "enhancement" clause), quoted the proviso in the 1941 Act, and added; "So it must be said that there is the same provision respecting compensation upon taking the ship of a foreign citizen or foreign corporation in our waters as there is for taking the ships of our nationals. I do not think we would be expected to pay more to others than we pay to our own citizens, but I do think that we would be expected to pay to others what we pay to our own citizens." 87 Cong. Rec. 4027. And at the Senate Hearings, Senator Bailey and Admiral Land (Chairman of the Maritime Commission) agreed that Section 902 would be applicable, and that (in the Senator's words) "the American owners, or if we should pass this bill, the foreign owners, would not receive the extraordinary values which have been attached to ships on account of this war and the great many sinkings, but would receive the normal values." Hearings before the Senate Committee on Commerce, 77th Cong., 1st sess., on S. J. Res. 67 and H. R. 4466 (May 1941) p. 25. In the face of these explicit statements, no con-

trary inference can properly be drawn from the casual general statements on which the "enhancement" clause's opponents lean so heavily."[84]

The natural mode of reading the "just compensation" proviso of the 1941 Act conforms to this Congressional purpose. The "applicable" provisions of Section 902 are those dealing with just compensation for unsubsidized American vessels, as distinguished from the clauses, for instance, establishing measures of payment for ships upon which a construction-differential subsidy had been allowed (sec. 902 (b)), or subsection (e), regulating the use by the Maritime Commission of requisitioned vessels (R. pp. 132, 134). There is no occasion for finespun exegesis, cutting the "enhancement" clause out of the statute.

b. With so many nations of the world making use of war enhancement prohibitions in awarding compensation for domestic requisitioned property (*supra*, pp. 71–73), we strongly doubt

[84] The references are to paying "full value" of the ships, "what they are reasonably worth," "just compensation" or "reasonable price" (Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 77th Cong., 1st sess. on H. R. 4088 and H. J. Res. 167 (April 1941), pp. 48, 54, 55); paying "the value in our port," paying "compensation for the use and for restoration of the ship to its condition" (Hearings before the Senate Committee on Commerce, *supra*, pp. 26, 114); making "full reimbursement of the value" of the requisitioned vessel (87 Cong. Rec. 4027); if the ships are bought, the Commission is "to pay for them what they are worth" (87 Cong. Rec. 4030).

whether Section 902's clause violates any present-day principles of just compensation in international law, whatever may have been the practice after World War I. But cf. Memorandum from the Department of State (dated April 16, 1943) quoted in 22 Comp. Gen. 1025, 1026–1030. The Report of the Second Advisory Board on Just Compensation (fn. 3, *supra*, 7; *infra* 142–9), "setting forth in particular the standards and principles to be observed in respect of the valuation of idle foreign merchant vessels requisitioned for title of use" under the 1941 Act embodied the interpretation of the "enhancement" clause which the first Board had adopted (*infra* pp. 142, 144–5), but concluded nevertheless that "these rules conform to the requirements of the Constitution of the United States and with the applicable standards of international law." (*Infra* p. 149.)

c. In any case, the purpose of Congress to equate the treatment of domestic and foreign shipowners seems plain,[65] and principles of international law cannot avail, in our principal tribunals, to overcome a conflicting statutory mandate. *The Cherokee Tobacco*, 11 Wall. 616; *Head Money Cases*, 112 U. S. 580, 597–599; *The Chinese Exclusion Case*, 130 U. S. 581, 600–1; *Fong Yue*

[65] It goes almost without saying that the "enhancement" clause in the 1936 Act, as amended in 1939, which applied only to American-owned vessels, need not be read with the requirements of international law in mind.

Ting v. *United States*, 149 U. S. 698, 720–1; *Hijo* v. *United States*, 194 U. S. 315, 324; *Pigeon River Improvement, Slide & Boom Co.*, v. *Cox Co.*, 291 U. S. 138, 160; cf. *Clark* v. *Allen*, 331 U. S. 503, 509.

III

THE TYPE AND MEASURE OF THE "ENHANCEMENT" EXCLUDED BY SECTION 902

Strenuous battle has raged since 1942 over the type and measure of the enhanced value excluded by the "enhancement" clause.[66] Three major interpretations have been advanced. One, that of the Comptroller General, is that the clause prohibits the payment of compensation to the extent that it may be based upon values in excess of those existing on September 8, 1939 (the date of the President's proclamation of a limited national emergency), provided that such excess be determined as due to economic conditions directly caused by the national emergency. 22 Comp. Gen. 497, 608. A second construction, announced by the Advisory Board on Just Compensation in December, 1943, and elaborated by the Second Advisory Board in 1945 (fn. 3, *supra*, p. 7) (Appendix B, *infra*, p. 136; Appendix C, *infra*, p. 142) defines the excluded enhanced value as that "due, to the Government's need of vessels which

[66] Since the Court of Claims held the clause inapplicable to its own proceedings, it did not canvass the various constructions, current and possible, of enhanced value to be eliminated.

has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect occurred before or after the declaration of the national emergency of May 27, 1941," but not including enhancement due to a general rise in prices or earnings of commodities or property, or of merchant vessels, if not due to the Government's need of vessels which necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, which is reasonably probable. The third interpretation—adopted by respondent (Br. in Opp., pp. 9–10) and by many shipowners—is that the clause does no more than incorporate, and goes no further than, the existing judicially developed doctrines of just compensation, especially as recently elaborated in *United States* v. *Miller*, 317 U. S. 369.[67]

[67] In brief, the early history of the controversy is as follows. The Presidential proclamation of an unlimited national emergency on May 27, 1941 (Proclamation 2487, 3 C. F. R., Cum. Supp., p. 234) made effective the requisitioning powers of Section 902, but large-scale requisitioning of American merchant ships did not begin until April 1942, with the War Shipping Administration as the requisitioning agency (fn. 2, *supra*, pp. 5–6). The Comptroller General formally announced his views on the "enhancement" clause in a letter of November 28, 1942. 22 Comp. Gen. 497. The War Shipping Administration strongly disagreed with these views, and (in December 1942) suspended payments under determinations of just compensation previously made, and ceased making new determinations, except to relieve hardship. This was later modified to permit partial payments which

To aid the Court in passing upon the substantive content of the "enhancement" clause, we shall first set out the pertinent legislative materials, then outline the practice of the War Shipping Administration and the putative operation of the Comptroller General's ruling, and finally collate the various arguments drawn from text, legislative history, Congressional purpose, and operations.

A. *Legislative indications of the content of the*

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would comply with the Comptroller General's ruling. The Comptroller General adhered to his views (22 Comp. Gen. 608), and the controversy between the War Shipping Administration and the Comptroller General continued into the spring of 1943; in June 1943 the Chairman of the House Merchant Marine and Fisheries Committee introduced a bill (H. R. 2731, 78th Cong., 1st sess.) for the purpose of developing the relevant facts and contentions. Public Hearings were held [Hearings before the Committee on the Merchant Marine and Fisheries, H. of Reps., 78th Cong., 1st sess. on H. R. 2731 ("Just Compensation for Requisitioned Vessels")], and the committee had the matter under consideration when Executive Order 9387, appointing the Advisory Board, was issued on October 15, 1943 (fn. 3, *supra*, p. 6). Legislative proposals were thereupon dropped. 89 Cong. Rec. A4957–9. By the Executive Order, the Administrator was required to follow the Board's report of December 7, 1943. For the later history of the controversy, see *infra*, pp. 104–5, 111–13.

Many of the documents in the controversy, compiled by the War Shipping Administration, are reprinted in the so-called Document 20 (and its supplements) ("Compilation of Material On the Determination and Payment of Just Compensation for Vessels Requisitioned under Section 902 of the Merchant Marine Act, 1936") printed by the Committee on Merchant Marine and Fisheries, H. of Reps., 78th and 79th Congresses.

"enhancement" clause.—1. The brief history of the "enhancement" provision which we included in Point I (*supra*, pp. 25–38) leaves no doubt that the clause's prime purpose was to permit vessels to be taken at less than war or emergency prices, such as those paid during World War I. The 1916 Shipping Act's qualification that the "fair actual value" paid for the vessels requisitioned under that statute must be "based upon normal conditions" was an early recognition—before the United States entered the conflict—of the runaway ship prices modern war brings. When the United States did come to acquire vessels in the first World War, the prices that were paid, both in purchases and on takings, were extremely high, as Congress was acutely aware at all times during the two decades between the wars. For instance, the report of the House Select Committee of Inquiry into Operations, Policies, and Affairs of the United States Shipping Board Merchant Fleet Corporation, appointed by the 68th Congress, gives examples of the enormous "war-time prices" and refers to "fabulous prices" paid even for obsolete vessels. H. Rept. No. 2, 69th Cong., 1st sess., pp. 31–32 (1925).[68] From 1922 to 1941, Congressional dis-

[68] Some idea of the amounts required to be paid by the United States for title or use of vessels taken in World War I, and of the governing factors judicially applied under statutes which provided merely for the payment of just compensation, may be gathered from a series of Court of Claims ship requisition cases. *Use requisitions: Hudson*

cussions of relevant merchant marine legislation refer consistently to the need for avoiding the bulging prices of World War I in times of new

Navigation Co. v. *United States*, 57 C. Cls. 411 (1922) (Hudson river liner; Navy determined just compensation at $8,000 per month, bareboat charter; court determined it to be $12,000 per month, expressly taking account of wartime enhancement); *Gulf Refining Co.* v. *United States*, 58 C. Cls. 559 (1923) (six tankers; Shipping Board just compensation rate for bareboat hire (accepted by great majority of owners) was $4.15 per deadweight ton per month; court held it to be $6.60, again expressly including wartime enhancement); *Standard Transportation Co.* v. *United States*, 61 C. Cls. 906 (1926), certiorari denied, 273 U. S. 732 (same); *Standard Oil Company* v. *United States*, 61 C. Cls. 951 (1926) (same); *Atlantic Refining Co.* v. *United States*, 72 C. Cls. 1, 21, 26 (1931), certiorari denied, 285 U. S. 542 (same); cf. *Huron Navigation Corp.* v. *United States*, 60 C. Cls. 770, 790, 802, 806 (1925), appeal dismissed by stipulation, 273 U. S. 778. *Requisitions of title or of ship construction contract: Consorzio Veneziano* v. *United States*, 64 C. Cls. 11 (1927); *John M. Connelly S. S. Co.* v. *United States*, 64 C. Cls. 38 (1927); *Luckenbach S. S. Co.* v. *United States*, 64 C. Cls. 59, 78–9 (1927), certiorari denied, 277 U. S. 584; *Brooks-Scanlon Corp.* v. *United States*, 64 C. Cls. 80 (1927); *Ocean S. S. Co.* v. *United States*, 64 C. Cls. 98 (1927), certiorari denied, 277 U. S. 584; *Compagnie Generale Transatlantique* v. *United States*, 64 C. Cls. 119 (1927), certiorari denied, 277 U. S. 585; *DeLuca* v. *United States*, 84 C. Cls. 217, 244–247 (1936); see, also, *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 125 (1924).

World War I eminent domain cases, involving other types of property, likewise awarded high wartime prices. *E. g.*, *United States* v. *New River Collieries*, 262 U. S. 341 (coal); *Davis* v. *Newton Coal Co.*, 267 U. S. 292 (coal); *National City Bank* v. *United States*, 275 Fed. 855 (S. D. N. Y.), affirmed, 281 Fed. 754 (C. C. A. 2) (coffee); *C. G. Blake Co.* v. *United States*, 275 Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. C. A. 6) (coal); *Prince Line* v. *United States*, 283 Fed. 535 (E. D. N. Y.) (Bush Terminal pier lease). Cf. Orgel,

necessity.[89] And it is common knowledge that, ever since the end of the first war, Congress has been strongly concerned about the high prices charged the Government for all war supplies, the large profits made on munitions or equipment furnished to the nation, and the large awards which were made for commandeered property. See, *e. g.*, the studies of the War Policies Commission, H. Docs. 163, 271, 72d Cong., 1st sess. (1931–2), especially No. 271, pp. 23–25 (high awards for commandeered property); the reports of the Special Senate Committee on Investigation of the Munitions Industry pursuant to S. Res. 206 of the 73d Cong., S. Rept. Nos. 577 and 944 (1935–6), 74th Cong., especially pt. 2 of No. 944, pp. 3, 111–113 (high awards for requisitioned property); Hearings before the Committee on Military Affairs, H. of Reps., 68th Cong., 1st sess. on H. J. Res. 128, H. R. 194, H. R. 4841 and H. R. 8111 (March 1924) ("Universal Mobilization for War Purposes"); and Hearings before the Committee on Military Affairs, H. of Reps., 74th Cong., 1st sess. on H. R. 3 and H. R. 5293 (January 1935) ("Taking the Profits Out of War").

2. In addition to this pervading and significant

Valuation Under the Law of Eminent Domain (1936), Sec. 25 ("War-Time Prices"); Note (1940) 40 Col. L. Rev. 1390, 1401–2; 54 Harv. L. Rev. 278, 303–4; 50 Yale L. J. 250, 277–9.

[89] See, *e. g.*, 63 Cong. Rec. 367–8; 69 Cong. Rec. 7916–7; 79 Cong. Rec. 10200; 80 Cong. Rec. 9920–1; 84 Cong. Rec. 10626; Hearings before the Senate Committee on Commerce, 77th Cong., 1st sess. on S. J. Res. 67 and H. R. 4466, p. 25.

general purpose, some more specific inklings of Congressional understanding of the effect and operation of the "enhancement" clause are available. When the "enhancement" clause, in the terms in which we now have it, first appeared in 1922, the House Committee on Merchant Marine and Fisheries characterized it as insuring "a fair price, and such fair price is to be based upon a fair actual value of the vessel without inflation, due to the causes which necessitated the taking." H. Rept. No. 1112, 67th Cong., 2d Sess., at p. 29. In the course of debate on the unsuccessful measure, Representative Edmonds, supporting the limitation, indicated that it would cut down the taking price substantially below the value accruing when the "war comes on." 63 Cong. Rec. 97. Mr. Davis of Tennessee (an opponent of the bill), however, futilely sought to amend the bill to require the payment of no more than actual cost less depreciation, apparently believing that the "enhancement" clause, by itself, would not be sufficiently effective to abolish payment of war-inflated prices. 63 Cong. Rec. 367–8.[70] On the other hand, in 1928, in the debate on the Merchant Marine Act of that year which incorporated the "enhancement" clause, Mr. Davis (then a supporter of the measure, and a member of the conference committee) supported the limitation as excluding

[70] Mr. Davis' proposal was very similar to that which was later incorporated in Section 802 of the Merchant Marine Act, 1936 (*infra*, p. 129) with respect to subsidized vessels.

"any enhancement because of the emergency," and specifically contrasted requisition "under the general law," as in World War I, where the United States was "required to pay the market value at the time of taking, which in numerous instances was many fold what the ship was worth in peace times." 69 Cong. Rec. 7916–7.[71]

3. As we have pointed out (*supra*, p. 28), the clause was carried over intact in the new merchant marine bills considered by the Congress in 1935 and 1936. During the House consideration of the taking provisions of the measure (then restricted to Government-aided vessels), Congressman Moran successfully proposed an amendment, retaining the "enhancement" provision but limiting awards to no more than the vessel's cost less depreciation. In his view, the "enhancement" clause would not properly operate to eliminate enhancement occurring before the United States entered a war (as during 1914–1917), and a more severe formula was needed.

[71] In 1925, the Select Committee of Inquiry into the Operations, Policies and Affairs of the United States Shipping Board Merchant Fleet Corporation had recommended that the requisition provisions of the Shipping Act of 1916 (*supra*, p. 25) (the only then existing requisition statute) be amended "so as to clearly and specifically provide that in the event of a future national emergency and the need for such [Shipping Board] ships for national defense, the Government could take them over on the basis of charter rates prevailing before the emergency arose, or at the world market value of such ships before the emergency arose." H. Rept. No. 2, 69th Cong., 1st sess., p. 25.

79 Cong. Rec. 10200.[72] (The amendment which he proposed found its way into Section 802 of the Act, governing the taking of subsidized vessels. *Infra*, p. 129.) Authority to requisition unsubsidized ships was added by the Senate (*supra*, p. 20); but the debate in that body concerned mainly the provisions for paying owners of *subsidized* vessels, and reveals little more than that the Senate agreed with the House that a cost maximum should limit awards in the latter case. 80 Cong. Rec. 9920–21, 10077.[73]

At the time the 1939 amendments to Section 902 were being considered (*supra*, pp. 33–35), the American Merchant Marine Institute, representing the large majority of American shipowners, requested the House Committee to amend the "enhancement" clause so that the value of the property taken or used would not be deemed enhanced by the *immediate* causes necessitating the taking or use; the Institute intended this amendment to confine the excluded enhancement to that occurring during an actual war. (Hearings before the

[72] Mr. Moran adhered to this view of the "enhancement" clause after he became a member of the Maritime Commission, stating, in 1940, that the clause "does not protect against price raises caused by the general conditions leading to an emergency before the actual emergency arises, as experienced in the year 1914–17."

[73] Senator Bone, who insisted on the cost maximum provision, did not refer to the "enhancement" clause at all, though he did criticize the taking provisions in general, and particularly the payment of "fair actual value" for subsidized ships. 80 Cong. Rec. 9920–21.

Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st Sess. on H. R. 4983, April 27, 1939, pp. 15–16.) The Committees and the Congress did not adopt this suggestion but retained the previous wording. In a very short discussion of the Committee's own proposal, Senator Bailey, Chairman of the Committee on Commerce, told the Senate that, as amended, the statute requires the valuation for a taking award "not be on any enhanced value due to the emergency, but on the value prior to the emergency." 84 Cong. Rec. 10626–10627. There was no relevant debate in the House. 84 Cong. Rec. 6105.[74]

4. a. This twenty-five year course of Congressional concern with ship requisitions and with enhancement leaves no doubt of the plain purpose to prevent a repetition of the World War I experience. Congress openly desired, if it could, to prevent requisition awards as large as those allowed by the courts, or even as high

[74] The Act of June 6, 1941, 55 Stat. 242, Public Law No. 101, 77th Cong., (*infra*, p. 135), which authorized the taking of foreign merchant vessels lying idle in our waters, provided for the determination and payment of just compensation "in accordance with the applicable provisions of section 902." The single reference to the content and effect of the "enhancement" clause was the agreement of Senator Bailey and Admiral Land, at the Senate hearings, that under Section 902 the shipowners, foreign or domestic, "would not receive the extraordinary values which have been attached to ships on account of this war and the great many sinkings, but would receive the normal values." Hearings before the Senate Committee on Commerce, 77th Cong., 1st Sess. on S. J. Res. 67 and H. R. 4466 (May 1941), p. 25.

as the prices voluntarily paid by the Shipping Board. The "enhancement" clause was regarded as the primary mechanism for accomplishing this aim of placing a reasonable ceiling upon the amounts the Government would have to pay for vessels in time of a new war or national emergency. Until 1936, the clause applied only to takings of government-aided or previously-government-owned vessels, but when it was extended to unsubsidized ships by the Merchant Marine Act of 1936, there was no hint of a suggestion of any change in the basic purpose to limit the prices of ships taken by the United States. *Supra,* pp. 28–30, 97–98. Rather, the same fundamental goal has been reiterated whenever Congress has had to deal, since 1936, with the requisition of ships for national defense or war ends. *Supra,* pp. 33–38, 98–99. It follows that, in Congress' eyes, the clause was decidedly more than a restatement of the judicially-developed standards of just compensation which had governed in previous ship-taking cases; and it is noteworthy that, before requisitions under Section 902 commenced in 1941 and 1942, shipowners seemed to be of precisely the same view. See the statement of John J. Burns, representing the American Merchant Marine Institute, at the hearings on the 1939 Amendments to Section 902, quoted *supra,* at p. 34. (Hearings before the Committee on Merchant Marine and Fisheries, H. Reps. 76th

Cong., 1st Sess., on H. R. 4983, April 27, 1939, pp. 15–16.)

b. The legislative history we have set forth is less clear as to the precise extent and confines of the limits Congress wished to impose upon the awards to be made for requisitioned vessels. Little attention was given to the actual words of the clause—"in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use"—or to their explication. But certainly there is warrant for saying that the aim was to pay for the ships at their peacetime values, at the prices current in the normal market before the emergency arose. It is less clear what "emergency" Congress had in mind—this country's own emergency or need for ships, or the emergency or shipping needs of other nations at war, which would naturally be reflected in rising market prices for American vessels. Some references to the increase of prices from 1914 to 1917, before the United States entered World War I, suggest that certain proponents of limiting the prices to be paid for requisitioned tonnage viewed the "enhancement" clause as ineffective to cut down values occurring during a war period prior to our entry into the conflict. *Supra*, pp. 96–98. On the other hand, Congress well knew that ship prices rose steeply from 1914 to 1917, because of

the European War,[25] and it is highly improbable that it meant the "enhancement" clause to take no account of the value-inflation which would occur during a similar period of tension or extra-American conflict, occurring prior to our becoming involved in the struggle. At least at the time of the 1939 amendment, it would not have appeared too remote that, if another World War were to come, the United States would enter the struggle, if at all, only after some months or years of official non-participation. And it was the 1939 Congress which refused to adopt the Merchant Marine Institute's suggestion that excluded enhancement be limited to that due to the "immediate" causes necessitating the taking. *Supra*, pp. 98–99.

c. As we sum it up, the conviction may surely be drawn from the clause's history that Congress meant to bar recovery of amounts comparable to those secured for ships in World War I, and to that extent desired to discard the doctrine that current-market-value-at-the-time-of-taking determines just compensation. Less surely, but still with a fair degree of conviction, we conclude that Congress desired to exclude at least some enhancement occurring during a definite period of

[25] This rise was already clear when Congress enacted Section 10 of the Shipping Act of 1916, with its emphasis on fair actual value "based upon normal conditions." *Supra*, pp. 25–26.

tension prior to the actual engagement of this country in war. The legislative record seems still less clear as to actual starting point of the enhancement Congress intended to be eliminated or, in alternative words, the exact "causes necessitating the taking" which lay in the mind of Congress.

5. Since the controversy over the meaning of the "enhancement" clause first became acute late in 1942, Congress has, at different times, taken action which can be construed as confirmation of both the Advisory Board's views and those of the Comptroller General. The National War Agencies Appropriations Act, 1946, Act of July 17, 1945, 59 Stat. 473, 480 made funds available for "carrying on all the activities and functions of the War Shipping Administration as prescribed" in designated Executive Orders, including Order No. 9387, establishing the Advisory Board on Just Compensation and requiring the Administration to follow its rules (*supra*, fn. 3, p. 6). The designation of specific Executive Orders was a change from the previous appropriation act which referred only to authority and functions "heretofore or hereafter lawfully vested in such Administration" (National War Agency Appropriation Act, 1945, Act of June 28, 1944, 58 Stat. 533, 542), and the specific reference was openly designed by its administrative sponsors to give legislative sanction to the provisions of the stated Orders. Hearings before the Subcommittee of the Com-

mittee on Appropriations, H. of Reps., 79th Cong., 1st Sess. on the National War Agencies Appropriations Bill for 1946, pp. 459–461. Similar designation of Executive Order No. 9387 appears in the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 Stat. 481, 499–500, 501.

On the other hand, in its Second Supplemental Appropriation Act, 1948 (Public Law No. 299, c. 414, Act of July 31, 1947), the 80th Congress appears to have confirmed the Comptroller General's ruling. That statute transferred the War Shipping Administration's unexpended balances from the Maritime Commission (which had received them by Section 202 of the Naval Appropriation Act, 1947, 60 Stat. 501, *supra*, fn. 2, pp. 5–6) to the Treasury, and authorized the Secretary of the Treasury "to liquidate such obligations as may be found by the General Accounting Office as having been properly incurred against such funds prior to January 1, 1947." In connection with this provision, the House Appropriations Committee referred to the outstanding claims for just compensation for vessels requisitioned under Section 902 (a), and stated: "The Comptroller General rendered a decision interpreting certain phases of this section early in the War, but the Commission so far has failed to consummate the settlements. These payments bear interest from the date of requisition of a vessel until the date of settlement, and it is the committee's desire that

these claims be processed with all practicable speed and with due regard to the decision of the Comptroller General." H. Rept. No. 1053, 80th Cong., 1st Sess., p. 3. During debate, Chairman Taber called this statement in the report to the attention of the House. 93 Cong. Rec. 10046 (July 24, 1947, daily ed.).[76] Perhaps the 80th Congress' confirmation of the Comptroller General's "enhancement" decisions is somewhat more explicit than the 79th Congress' approval of the views of the Advisory Board.

B. WAR SHIPPING ADMINISTRATION'S APPLICATION OF THE ADVISORY BOARD'S RULES; OPERATION OF THE COMPTROLLER GENERAL'S "ENHANCEMENT" DECISIONS

In general, at the outbreak of the Second World War in September 1939, values of the larger American ships and charter rates were quite low, compared to the level attained in the succeeding period. Between September 1939 and May 27, 1941 (the date of the President's proclamation of unlimited emergency) there was a steep rise in

[76] In deference to these legislative views, the Maritime Commission has adopted the policy of determining the remaining awards for requisitioned vessels on the basis of the Comptroller General's decisions, although a majority of the Commissioners (in January 1948) expressed themselves as believing that the Advisory Board's rules constitute the proper measure. The Comptroller General has stated that, in general, he will accept the Commission's certification that, in its opinion, the award is consistent with the applicable decisions of the General Accounting Office. B-30613, B-69148, October 13, 1947.

market values of ships as well as of charter rates. Toward the end of 1941, these prices and rates began to fall and by the time the full scale requisitioning program commenced in April 1942, the market values of ocean going vessels were lower than they had been in May 1941, but still substantially higher than the 1939 levels. See testimony of Admiral Land at Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., on H. R. 2731 (June 10, 1943), pp. 5–8; cf. Rule 4 of the Rules of the Advisory Board on Just Compensation, *infra*, pp. 139–140.[77] It is in this general practical context that adminis-

[77] The Act of July 14, 1941, c. 297, 55 Stat. 591 (the so-called Ship-Warrant-Law—"An act to provide for priorities in transportation by merchant vessels in the interests of national defense, and for other purposes") authorized the President, through the Maritime Commission, to issue warrants to domestic and foreign vessels during the national emergency. Section 1. Vessels holding warrants were to secure priority over non-warrant-holders "with respect to the use of facilities for loading, discharging, lighterage or storage of cargoes, to procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels." Section 3. Warrants were to contain conditions to be set by the Commission, "with respect to the trades in which such vessel shall be employed, the voyages which it shall undertake, the class or classes of cargo or passengers to be carried, *the fair and reasonable maximum rate of charter-hire or equivalent*, and such incidental and supplementary matters as appear to the United States Maritime Commission to be necessary or expedient for the purposes of the warrant." Section 2.

Admiral Land has stated that the Commission and, later, the War Shipping Administration, used their authority, under this Act, to fix the "fair and reasonable maximum rate

trative awards of just compensation had to be made.[77]

1. *War Shipping Administration's application of the Advisory Board's rules.*—Executive Orders 9387 and 9614 (fn. 3, *supra*) required the War Shipping Administration to be guided by the rules established by the Advisory Board, and after December 1943 the Administration pur-

of charter-hire" for warranted ships at levels which would reduce the existing market rates from their "exorbitantly high" peaks. He also reported that full-scale requisitioning was delayed for some time after the proclamation of the unlimited emergency in May 27, 1941 until the administrative efforts to cut down existing rates and values, by voluntary agreement as well as through the ship-warrant device, had produced some favorable results. Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., on H. R. 2731 (June 10, 1943) pp. 5–8.

[78] The following table gives the average of ship sales, from 1939 to 1942, for dry-cargo vessels ranging between 7,000 and 12,000 tons deadweight and from 20 to 25 years old. This class of vessels, we understand, constituted the heart of the War Shipping Administration's requisition program:

Year	Quarter	Average price (per dwt. ton)
1939	First	$12.50
1939	Second	10.49
1939	Third	12.94
1939	Fourth	21.08
1940	First	42.03
1940	Second	54.91
1940	Third	48.62
1940	Fourth	49.98
1941	First	63.77
1941	Second	84.39
1941	Third	No sales
1941	Fourth	80.62
1942	All	45.44

(This information has been supplied by the Maritime Commission, which compiled the table from reports of the

ported to follow those rules in making awards in this (R. 11) and other cases. With regard to ocean-going merchant vessels, the Administration found that the enhancement in ship values excluded by Section 902 (a), as construed by Rule 4 of its Advisory Board,[79] commenced in general to accrue in the opening weeks of 1941, which may be symbolized as the time when the Lend-Lease Act (Act of March 11, 1941, 55 Stat. 31) was under consideration. In making its awards for such vessels, the Administration generally disallowed increases in ship values occurring after that period, to the extent that these increases exceeded the general rise in prices or earnings. (For other types of vessels, no similar general formula of enhancement was established.) On the basis of this general finding, the Admin-

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Division of Economics and Statistics of the War Shipping Administration. It should be added that no accurate information is available concerning the state of repair of the vessels sold, and that it is therefore possible that some additional conditioning expenditure would have been necessary to place the vessels in sound condition.)

See also Appendix E (separately printed) for a chart of vessel prices from July 1937 to December 1940 (supplied from the files of the War Shipping Administration).

[79] Under Rule 4, the excluded or deducted enhancement consisted of that "due to the government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941," but "Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted". *Infra*, p. 139.

istrator fixed general charter rates for the use of ocean-going vessels, other than passenger ships and certain specialized types of vessels.[80] War Shipping Administration General Order No. 37, 9 Fed. Reg. 3806, 46 C. F. R., 1944 Supp., 302.101–302.113. The basic bareboat rate was fixed at $1 per dead-weight ton per month for colliers, $1.15 per dead-weight ton per month for tankers, and $1.25 per dead-weight ton per month for freighters constructed prior to 1934. These rates the War Shipping Administration has compared with the bareboat charter rate of $4.15 allowed by the Shipping Board in World War I, and the $6.60 rate awarded by the Court of Claims after the last war (see fn. 68, *supra*, p. 93). See also, Smith, *Influence of the Great War Upon Shipping* (1919), p. 199. General Order 37 established a basic value for tankers and dry cargo ships built prior to 1934—requisitioned for title—of $56.25 per dead-weight ton, which was to be reduced to approximately $47 in April 1945, but which was to be increased (by sums ranging from $8 per ton to $53 per ton) for tankers built in the United States during the period 1929–1934.[81]

[80] Most of the ocean-going fleet (over 1000 vessels) was requisitioned for use, under Section 902, rather than for title. The smaller crafts (over 2500 vessels) (including tugs, barges, yachts, special vessels) were mainly requisitioned for title, as was respondent's vessel.

[81] General Order 37 describes these ton-values as "with respect to risks insured or assumed of the War Shipping Administration," but the same values were used in awarding

The Administration has contrasted these values with the World War I Shipping Board basic value of $165 per dead-weight ton.

Awards made or charters given under the provisions of General Order 37 were accepted by the large majority of owners subject to its provisions. The Report of the second Advisory Board on Just Compensation (October 26, 1945) stated that the order "seems to have been remarkably effective in bringing about satisfactory adjustments with American owners pursuant to the rules announced previously by the Board." *Infra*, p. 143. The Comptroller General has indicated that a preliminary survey leads him "to believe that rates and valuations fixed in accordance with the formulae contained in W. S. A. General Order 37 may be substantially in excess of the amounts properly payable if due regard were given to the decision of November 28, 1942, 22 Comp. Gen. 497" (letter of October 13, 1947 to Chairman, U. S. Maritime Commission, B–30613, B–69148), and there is considerable controversy as to whether General Order 37 was a sound or correct application of the first Advisory Board's rules.

2. *Comptroller General's view.*—The Comptroller General has ruled that "the enhancement clause in said section 902 (a) prohibits the payment of compensation for such [requisitioned]

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compensation for requisitions of title. See, also, Section 902 (c), *infra*, pp. 133–4; fn. 6, *supra*, p. 21, and Rule 7 of the Rules of the first Advisory Board, *infra*, p. 140.

vessels to the extent that it may be based upon values in excess of the values existing on September 8, 1939 [the date of the President's proclamation of a limited national emergency], provided such excess be determined as due to economic conditions directly caused by the national emergency." 22 Comp. Gen. 497, at 501; 22 Comp. Gen. 608. The proviso permits some enhancement over the September 1939 values, as the Comptroller General has recently reaffirmed in a letter to the Maritime Commission (February 6, 1948; B–30613, B–69148): "As you probably are aware, this Office never has held that the effect of section 902 (a) was to place an absolute maximum valuation equivalent to values on September 8, 1939, upon vessels requisitioned under said section. Permissible enhancement over and above the valuation on that date was recognized in the original decision of November 28, 1942 [22 Comp. Gen. 497], and in later decisions. In that connection, the Advisory Board on Just Compensation correctly construed said decision of November 28, 1942, in its letter of December 7, 1943, to Admiral Land, when it said [*infra*, pp. 136–7]:

> "'Contrary to the impression existing in many quarters, the Comptroller General does not limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the de-

> termination of values. The necessity of allowing subsequent enhancement that is not 'directly' caused by economic conditions resulting from the emergency is specifically recognized by him.'"

Only recently have administrative awards for requisitioned vessels been calculated on the Comptroller General's interpretation of the "enhancement" clause. *Supra*, p. 105, fn. 76. It is our understanding that the Comptroller General has indicated that he will not object to an increase of approximately 5% to 33%, (depending on the date of requisition), over September 1939 ship values as representing enhancement not directly caused by economic conditions resulting from the emergency.[82] In an informal interoffice memorandum (dated November 3, 1948) the Comptroller General has said, concerning this increment:

> It is only fair and just that the Government should pay the amount so computed ["*i. e.* an increment representing the actual increases in the labor and material costs involved in building ships"] since it may be regarded as constituting, in effect,

[82] This rise represents the estimated rise in shipbuilding costs for cargo vessels and tankers over the period from 1939 to 1945; the graph indicating the fluctuations in the rise is sometimes called the Vickery scale, after the late member of the Maritime Commission. For the year 1943, the rise of about 30% on this scale compares with an increase of about 39% in the wholesale prices of all commodities from 1939 to 1943, and about 40% in the prices of producers' goods. Appendix F (separately printed) contains a graphic portrayal of the Vickery scale.

actual out-of-pocket loss by the owner due to the taking of his property. It is not fair that the Government should pay more, since the owner then would be taking advantage of the necessitous circumstances of his country in time of national emergency. And that is the very evil the prohibition was designed to correct. It may be presumed that the so-called Vickery Scale was worked out by persons familiar with shipbuilding costs and that it accurately reflects price trends. Accordingly, if the base valuation—that is, the value of the vessel on September 8, 1939,—appears, on the evidence at hand, to be reasonable, there may be accepted as proper under the statute a final valuation based upon the application of the scale, in the absence of evidence to indicate that it is inaccurate and excessive, and if it is supported by the certification required by B-30613, B-69148, October 13, 1947.

We also understand that the Comptroller General has indicated that he has no objection to the administrative awards which have been made for smaller vessels, under 1,000 tons, such as respondent's tug, since the War Shipping Administration certified that in the case of yachts, tugs, and fishing vessels, its awards did not exceed those payable under the Comptroller's decisions.

C. CONSIDERATION OF THE VARIOUS INTERPRETATIONS

1. At the outset of the difficult task of marking even tentative boundaries for the "enhancement"

clause's application, we may repeat our emphatic rejection of the view—held by the lower court (R. 16–17), by respondent (Br. in Op., pp. 9–10) and by other claimants—that the clause merely incorporates existing just compensation doctrine, in particular the rules that no consideration should be given to the taker's special need for the property or the owner's unwillingness to sell, as they have thus far been applied. *Supra*, pp. 99–101. The Act's legislative history is squarely against this view; Congress desired to restrict awards to levels much less than those allowed in decisions after the first war which applied the conventional rules.[83] Congress plainly did not want ship awards to be made at inflated wartime market prices, but those (like respondent) who propose this construction of the clause obviously aim to secure precisely those inflated values and it is clear that, on their view, the clause would be totally ineffective to attain the purpose of Congress. The addition of a superfluous sentence at the end of Section 902 (a), barring consequential damages, does not prove that Congress designed the "enhancement" clause to be equally unnecessary; and the history of the clause does affirmatively prove the opposite.[84]

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[83] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 76, the classic decision on exclusion of the taker's special need, was decided in 1913. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, and *United States* v. *New River Collieries Co.*, 262 U. S. 341, were decided in 1923.

[84] The sentence relating to "consequential damages", was

Secondly, it is appropriate to note that there may be no necessary conflict between the results attained under the Comptroller General's view and that of the Advisory Board, though it is plain that the points of approach differ. The former begins with September 1939 values and permits an increment computed according to the Vickery Scale; the latter starts with current market value at the date of taking and requires the deduction of excluded enhancement. In the letter transmitting its report, the first Advisory Board said (*infra*, p. 137):

> It is conceivable that, in application the difference might turn out to be far less than has at times been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

2. In the historical and philosophic sense, there is, of course, an endless chain of "causes necessitating the taking" of a particular vessel. With omission of some intervening steps, and emphasis on relatively direct "causes," there might be said to be, (i), first, the special need for the precise ship (*e. g.*, a tug for use on the Eastern Sea Frontier as a steam heating plant) (R. 9); (ii), the Government's need for this class of vessels in that locality (*e. g.*, tugs in New York); (iii), the Government's need for vessels of that type

carried over from the requisition provisions of the 1928 Merchant Marine Act. See fn. 14, *supra*, pp. 30–31.

(*e. g.*, tugs); (iv), the Government's need to purchase, take or charter merchant vessels to carry on war or defense activities; (v), the Government's wider general need for vessels, in private hands as well as its own, to carry on its war or defense activities; (vi), the national defense or war conditions, pertinent to American security, which brought about the need to take these active steps; (vii), the national or international conditions which led to these national defense or war causes—and so on, back into history. The evident purpose of Congress, on which we have laid great stress, to restrict the prices to be awarded for taken vessels below that payable under the pre-existing judicial rules of just compensation requires the rejection of such "immediate" causes as (i), (ii), and (iii), as the sole statutory "causes necessitating the taking"; the exclusion of enhancement due to these causes would not be effective to reduce awards made under the conventional rules of just compensation. But choice among the less immediate "causes" is hardly as plain.

3. a. The Comptroller General's reasons for adopting the date of September 8, 1939, may be summarized as follows (22 Comp. Gen. 497, 608, 877):[35] (a) By the "enhancement" clause Congress intended that compensation for a vessel

[35] While he was Representative from North Carolina, Comptroller General Warren served on the House Merchant Marine and Fisheries Committee, in the 74th, 75th, and 76th Congresses (1936–1940).

which had been requisitioned "under the stress of danger to the national security" should be measured by standards prevailing at a time when the factors which usually exist during such a period of danger were not operative to enhance the value of vessels (p. 500); (b) war, or the threat of war, produces a tremendous inflation of commodity prices, particularly of vessels (p. 500); (c) the "causes that necessitate the taking or use" of a private vessel by the Government, under Section 902, are "the prevalence of a danger or threat to the nation" (p. 501); (d) a certain and fixed date is necessary to mark the beginning of the period of excluded enhancement, in order to give effect to the intent of Congress (p. 501, 610); (e) excluded enhancement can begin to accrue before the power to requisition under Section 902 comes into effect (p. 610); (f) even though the requisitioning power may not have become operative until the proclamation of unlimited emergency in May, 1941, the earlier presidential proclamation of September 1939 announcing a national emergency for certain stated purposes marks the beginning of the period of prevalance of danger or of threat to the nation; during which no permissible enhancement can accrue (pp. 501, 610); (g) the appropriateness of this date is attested by the sharp rise in ship values thereafter (p. 610), and to choose the date of the later proclamation (May 1941) would "practically nullify the effect of the enhancement

clause" (p. 610); (h) permissible enhancement over September 1939 values is allowable if it is not "due to economic conditions directly caused by the national emergency" (p. 501).[86]

[86] The Comptroller General's first decision (22 Comp. Gen. 497, November 28, 1942) appeared to assume that the proclamation of September 8, 1939 (3 C. F. R., Cum. Supp., p. 214; 3 C. F. R., 1939 Supp., p. 59) was sufficient to authorize the requisitioning of ships under Section 902, and that that fact was of importance in determining the beginning of the period of excluded enhancement. 22 Comp. Gen. at 501. The War Shipping Administrator then pointed out that, in the view of the Maritime Commission and of the interested Congressional committees, the power did not come into operation until the proclamation of an unlimited emergency on May 27, 1941. It was pointed out that the first proclamation (entitled "Proclaiming a National Emergency in connection with the Observance, Safeguarding, and Enforcement of Neutrality and the Strengthening of the National Defense within the Limits of Peace-time Authorizations") stated that "measures required at this time call for the exercise of only a limited number of the powers granted in a national emergency," proclaimed only "that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peace-time authorizations," and added that "specific directions and authorizations will be given from time to time for carrying out these two purposes." The Administrator further pointed out that the President had never authorized or directed the making effective of Section 902's requisitioning powers; although he had issued orders under the proclamation to other agencies and in other connections; that the President had consistently affirmed his intention to adhere to specific directions and authorizations in carrying out the purposes of the September 1939 proclamation; and that the President had consistently distinguished between a limited emergency, such as that declared in September 1939, and a full national emer-

b. There is much to be said for the definitive selection of the opening of World War II as the beginning of the period of excluded enhancement. The fixed date simplifies calculation, and certainly the Comptroller General rightly states that the commencement of a general European war was bound to cause ship values to jump enormously. Congress enacted the "enhancement" clause with World War I shipping history well in mind, especially the rise in merchant ship values from 1914 to 1917, and the fact that they had reached high levels by the time this country entered the war in April 1917. *Supra*, pp. 25–32, 93–99. It is not unreasonable to say that, in Congress' eyes, the "normal" or the "fair" market would be that existing before the breaking out of a titanic international struggle which would necessarily inflate ship prices sharply, even though the United States was not yet a participant in the conflict. On this view, Congress equated the existence of such a general state of war—into which this country

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gency (as declared in May 1941). Certain congressional statements and actions during the period from 1939 to 1941, inconsistent with the view that the requisitioning power had become effective in September 1939, were also adduced. Cf. paraphrase of and excerpts from the Administrator's letter in 22 Comp. Gen. at 608–610.

The Comptroller General's second decision (22 Comp. Gen. 608, January 7, 1943) withdrew the earlier suggestion that power to requisition existed in September 1939, but reaffirmed his earlier conclusion even on the assumption that it was not [illegible] until the proclamation of unlimited emergency in May 1941 that the power became effective.

might well be drawn—with the "cause necessitating the taking," if we thereafter entered the struggle and requisitioned vessels in prosecution of the war. Section 902's "enhancement" clause would then parallel those of Great Britain's and Canada's 1939–1940 legislation, which exclude any appreciation in value due to the "emergency" or the "war" (*supra*, pp. 71–72).[87] And, in the case of World War II, this construction would bar substantially all of the great increase in ship values which occurred after September 1939. *Supra*, pp. 105–7.

4. The Advisory Board on Just Compensation defined the "causes necessitating the taking" to include "the Government's need of vessels which has necessitated the taking," "the previous taking of vessels of similar type," and "a prospective taking, reasonably probable"——whether such need, taking, or prospect occurred before or after the proclamation of an unlimited emergency on May 27, 1941—but not to include "a general rise in prices or earnings, whenever occurring." Rule 4, *infra*, pp. 139–140. We read the first part of this

[87] Support for this view may be drawn from the refusal of Congress, in 1939, to amend the clause so as to bar only enhancement due to the "immediate" causes necessitating the taking. *Supra*, pp. 98–9. It may also be said to be supported by the Congressional references—in the course of consideration of the "enhancement" proviso—to the clause as insuring the payment of peacetime prices, of the "value prior to the emergency," of "normal values," or of values before the "war comes on." *Supra*, pp. 96–9.

definition to cover the Government's general need for vessels in carrying on its defense and war activities, whether the ships remained in private hands or came into Government possession.[88] So construed, it apparently marks the beginning of excluded enhancement as the time when the Government itself begins to undertake or sponsor significant activities involving shipping.[89] This view is, of course, more nearly kin to the accepted judicial doctrines concerning value-to-the-taker (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53) and increment-due-to-initiation-of-the-project (*United States* v. *Miller*, 317 U. S. 369); and it may also be somewhat closer to the common un-

[88] This seems to accord with the War Shipping Administration's interpretation of Rule 4.

Enhancement attributable to the "Government's need" and the Government's takings would, as we read it, include increases in values due to (a) the increased demand for vessels to carry military, naval, or other defense cargoes (including lend-lease shipments), whether the vessels remained in private hands or were sold or chartered to the Government, or were requisitioned; and (b) an actual or potential shortage of merchant vessels (whether for private use or to fulfill Governmental needs) because of the great increase in the "Government's need" or because of the Government's past or future requisition program.

The reference to a "general rise in prices or earnings" is to a general rise with respect to other commodities or industries, as well as to rise in prices and earnings of merchant vessels *not* consisting of excluded enhancement. See *infra*, pp. 139–140, 148–9.

[89] In World War II, the War Shipping Administration considered this period to have begun in the opening weeks of 1941. *Supra*, p. 108. The ship-values as of that time are described, in rough, at p. 107, *supra*.

derstanding of the clause's wording. On the other hand, the Board's stress on the "Government's need of vessels," as the main "cause necessitating the taking," may not go far enough to fulfill the statute's purpose.

5. The Advisory Board and the Comptroller General are certainly correct in concluding that excluded enhancement cannot be limited to that accruing in the period after the declaration of May 27, 1941, proclaiming the "national emergency", which was considered as bringing into life the requisitioning powers of Section 902. It seems fairly certain that Congress was concerned to strike down at least some of the increase in ship values occurring before the situation became serious enough to authorize requisitions. Otherwise, the "enhancement" clause would be quite ineffective as a limit on prices in the normal case of takings immediately following a proclamation of national emergency or a declaration of the advisability of requisitioning.[30] The "causes necessitating the taking," in Congress' sense, would ordinarily antedate the general determination that vessels can be taken. Accordingly, it is too narrow a construction to read the phrase as simply referring to the formal coming-into-existence of the national emergency proclaimed by the President,

[30] World War II was atypical, in that a year intervened between the President's proclamation and the general exercise of the requisitioning power. *Supra*, pp. 106–7.

thus excluding only such enhancement as occurs after that date.

D. *Constitutionality of the different interpretations of the statute.*—As we have pointed out (fn. 43, *supra*, p. 64), our discussion of the "enhancement" clause's constitutionality (Point II, *supra*) has not contained separate treatments of the various interpretations (the Comptroller General's and the Advisory Board's) because we think the statute valid under either construction. Like the Comptroller General, the allied nations to whose regulations we have referred (*supra*, pp. 71–3) eliminate any "enhancement" in values due to the "war" or the "emergency," and these provisions warrant the basic fairness and justice of a similar reading of Section 902 of the Merchant Marine Act, 1936.[91] A legislative judgment that shipowners should not receive inflated values attributable to a war, into which this country was later drawn, cannot be deemed confiscatory, arbitrary, or unreasonable.

The constitutionality of the other interpretation of the clause follows *a fortiori*. As we have shown, the elimination of value-increase stemming from the Government's general need for shipping (i. e., the Advisory Board's rule) comes close to the judicial principles already announced by the

[91] The Canadian statute was not enacted until August 7, 1940; the Australian "Basis of Compensation Order" was issued in March 1942. *Supra*, pp. 71–3.

Court, in cases in which Congress has not itself laid down any measure of just compensation. *Supra*, pp. 69–71, 121–2.[92]

IV

APPLICATION OF THE "ENHANCEMENT" CLAUSE TO THE INSTANT CASE

Although the Court of Claims did not detail its understanding of the meaning of the "enhancement" clause, it found (R. 12–13) that (a) beginning on September 8, 1939 (the date of the proclamation of a limited national emergency) and continuing up to the date that respondent's vessel was requisitioned [October 15, 1942], there was a general rise in the market values of nearly all vessels in and about the Port of New York; (b) this increase in values between September 8, 1939 and May 27, 1941 (the date of the proclamation of unlimited emergency) "was due to the demand for vessels which followed the outbreak of war in Europe";

[92] It is not clear whether the first Advisory Board considered that its rules would satisfy all constitutional requirements if they were to be applied by courts, but one may guess that at least two of the members reached that issue and answered it affirmatively. The second Board expressly stated that its supplementary rules—incorporating and amplifying the earlier rules—"conform to the requirements of the Constitution of the United States." *Infra*, p. 149. Both Boards' terms of reference provided that they were to act "in accordance with the applicable provisions of the Constitution and the laws of the United States." Fn. 3, *supra*, pp. 6–7.

(c) after May 27, 1941, and particularly after December 7, 1941 (the attack on Pearl Harbor), "the rise in market values was due [i] to the Government's need for vessels, which necessitated the taking of many vessels, and [ii] to the great increase in shipping and in harbor traffic which occurred during the period of the war." The Court found that "these conditions combined to create a demand for and a shortage of tugs," and, as a result, the value of respondent's tug, the *MacArthur,* had been enhanced by the sum of $5,000 by the date of taking, October 15, 1942 (R. 13).[93]

A. On the Comptroller General's view, the entire enhancement of $5,000 would clearly be deducted, possibly less some sum for enhancement not directly caused by economic conditions resulting from the emergency. Such a possible allowance of permissible enhancement has not been touched upon by the Court of Claims, and we are unable to say definitely whether any existed in this case, though the court's findings—which stress the effect of the war on tug values in New York—seem to negative it.

B. Under the Advisory Board's rule, an undetermined, but certainly substantial, portion of the

[93] The court also found that the "rising market and a strong demand for tugs of all types" which existed in the Port of New York at the time of requisition, "was due to the greatly increased traffic in the harbor during the period of the war, to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs" (R. 11–12).

$5,000 lump of enhancement should be eliminated. The findings expressly attribute a part of the increase in values to "the Government's need for vessels, which necessitated the taking of many vessels" (R. 13), as well as "to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs" (R. 12). Such enhancement is clearly within Rule 4 (*infra*, pp. 139–140), as the Court of Claims appears to acknowledge (R. 14).

The remaining enhancement since 1939, the court has found, was due to "the demand for vessels which followed the outbreak of war in Europe" (R. 12) and to "the great increase in shipping and in harbor traffic which occurred during the period of the war" (R. 13, 12), without specifying the nature of this harbor traffic. It may very well be that much, if not all, of this value-increase was due to the Government's need for vessels, in the liberal sense in which we believe the Advisory Board used that phrase, and with which we agree (*supra*, pp. 120–1), but which the court below has apparently not used in its findings. For instance, an increase in New York harbor traffic because of munitions or lend-lease shipments to Great Britain or the Soviet Union would be covered, even though the carrying vessels were privately owned or operated, or were foreign vessels. The Court of Claims has said that it is not possible to allocate a definite part

of the increase in market value to the Government's need for vessels in the prosecution of the war (R. 14), but it is probable that some fair judgment can be made, especially if the full meaning of the "Government's need for vessels" is applied.

Moreover, the findings themselves indicate the likelihood that the larger part of the $5,000 enhancement from September 1939 to October 1942 accrued in the seventh month period respondent held the vessel (March 19, 1942—October 15, 1942). For respondent purchased the tug in an open-market transaction for $2,875 (R. 8), and added roughly $6,000 in repairs and reconditioning (R. 9), a total of about $9,000. If the *MacArthur's* market value was $15,500 (R. 12) on October 15, 1942, it is probable both that the sharp value-increase occurred in the interim, and that it was wholly due to the Government's great need for vessels (in the large sense) in 1942.

C. If the Adyisory Board's interpretation of the "enhancement" clause is accepted, the question of the exact amount to be deducted would remain for determination by the court below, unless it is felt that the present findings require the elimination of the entire increase. If the September 1939 date is accepted as decisive, the whole of the $5,000 enhancement would appear to be deductible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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DECEMBER 1948.

APPENDIX A

1. The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, 49 Stat. 1985, 2011, 2015) provide as follows:

> SEC. 802. Every contract executed by the Commission under authority of title V [*i. e.* "Construction-Differential Subsidy"] of this Act shall provide that:
>
> In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the fair actual value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels. In computing the value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.
>
> The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.
>
> * * * * * *
>
> SEC. 902. (a) It shall be lawful for the Commission to requisition any vessel documented under the laws of the United States,

during any national emergency declared by proclamation of the President, and when so taken or used, the owner shall be paid the fair actual value of the vessel at the time of taking, or paid the just compensation for the vessel's use based upon such fair actual value (excluding any national defense features previously paid for by the United States), less a deduction from such fair actual value of any construction differential subsidy allowed under this Act, and in no case shall such fair actual value be enhanced by the causes necessitating the taking. In the case of a vessel taken and used, but not purchased, the vessel shall be restored to the owner in a condition at least as good as when taken, less reasonable wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the vessel in such condition. The owner shall not be paid for any consequential damages arising from such taking or use.

(b) Except in cases of vessels where a construction differential subsidy has been allowed and paid, in which case the value of the vessel for the purposes of this section shall be established as provided in section 802, the Commission shall ascertain the fair compensation for such taking or use and shall certify to Congress the amount so found by it to be due for appropriation and payment to the person entitled thereto. If the amount found by the Commission to be due is unsatisfactory to the person entitled thereto, such person shall be entitled to sue the United States for the amount of such just compensation and such suit shall be brought in the manner prescribed by paragraph 20 of section 24, or by section 145 of the Judicial

Code, as amended (U. S. C., title 28, secs. 41, 250).

2. The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, 49 Stat. 1985), as amended by the Act of June 23, 1938, c. 600, sec. 33, 52 Stat. 962, and the Act of August 7, 1939, c. 555, sec. 3, 53 Stat. 1255, 46 U. S. C. 1212, 1242, provide as follows:

> SEC. 802. Every contract executed by the Commission under authority of title V of this Act [*i. e.*, "Construction-Differential Subsidy"] shall provide that—
>
> In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Commission, whichever is the greater. Such determination shall be final. In computing the depreciated value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.
>
> The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.

SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of

any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States

shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

* * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.

3. Pertinent portions of the Act of June 6, 1941, c. 174, 55 Stat. 242, as amended, ("An Act to authorize the acquisition by the United States of title to or the use of domestic or foreign merchant vessels for urgent needs of commerce and national defense, and for other purposes") are as follows:

> * * * That whereas Congress has power to provide for the common defense and general welfare and to regulate commerce with foreign nations and whereas for this purpose embargo Acts and nonintercourse Acts have from time to time been passed and whereas the commerce of the United States is at the present time interrupted and the general welfare of its citizens is threatened and an emergency has been declared, for the purposes of national defense, during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended
> * * *

APPENDIX B

Letter of Transmittal and Report of Advisory Board on Just Compensation

Advisory Board on Just Compensation,
Washington, D. C., December 7, 1942.

Dear Admiral Land: We are herewith enclosing our report as the Advisory Board on Just Compensation. In it we have set forth in the form of rules the standards and principles to be observed, in respect of the valuation of vessels requisitioned for title or use by the United States, and in the disposition of matters which have arisen and will arise in connection with the granting of insurance upon and the voluntary chartering of vessels.

In arriving at the conclusions the rules embody we have been greatly aided by the material contained in Document 20, in the hearings before the Bland committee, and by the arguments and briefs filed at the public hearing held on November 26 and 27. Because of the full and exhaustive character of these aids to our deliberations, our labors have been greatly lightened, the time required for them has been shortened, and our confidence in the correctness of the rules we have embodied in our report as our best judgment in the premises has been greatly enhanced.

It seems appropriate to comment briefly on the Comptroller General's ruling of November 28, 1942. Contrary to the impression existing in many quarters, the Comptroller General does not

limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the determination of values. The necessity of allowing subsequent enhancement that is not directly caused by economic conditions resulting from the emergency is specifically recognized by him. This standard does not necessarily exclude subsequent enhancement which directly reflects the economic changes incident to the improvement in general conditions since 1939.

It is obviously impossible to know without very extensive inquiry into the facts to what extent any enhancement in value was due to that cause, and the order which created the Board confined its duties to the establishing of "standards, rules, and formulae." On this account we did not undertake to consider how far the rules we are submitting would in practice reach different results from the rules recommended by the Comptroller General. It is conceivable that in application the difference might turn out to be far less than has at times been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

We have been greatly impressed not only with the care and consideration which the record discloses that both you and the Comptroller General have given to the matters involved, but with the moderation and judgment exercised by all concerned in endeavoring to work out a solution consistent with the interest of the United States and the justice of the case. In closing we take this

opportunity to record our great appreciation of the fact that this has been so.

Respectfully,

(Signed) LEARNED HAND.
(Signed) JOHN J. PARKER.
(Signed) JOSEPH C. HUTCHESON, JR.

Admiral EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the order of the President of October 15, 1943, establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States," establishes "fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered, or insured by the Administration."

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest. Value means value on the American market, not on foreign markets.

Rule 2.—In the case of requisition of foreign-flag vessels under Public Law 101, just compensation should be determined as in the case of domestic vessels.

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of

taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

Rule 5.—The enhancement clause of section 902 (a) of the Merchant Marine Act of 1936, has no application to the valuation of chartered vessels for the purpose of insurance.

Rule 6.—The enhancement clause of section 902 (a) has no application to voluntary charters or purchases under Public Law 101.

Rule 7.—In the event of loss due to a risk assumed by the United States in connection with the use of any vessel where no valuation or other mode of compensation has been agreed to, just compensation should be determined on the basis of value on the date of such loss. Where a redetermination or readjustment of rates or values is effected pursuant to the terms of a charter or other agreement, just compensation should be determined as of the date of redetermination. In both cases the determination is subject to deduction on account of enhancement, if any, as hereinabove set out in rule 4.

Rule 8.—Section 902 (b) of the Merchant Marine Act of 1936 has no application to vessels merely because they have received mail subsidies under the act of 1928. The section has application only to vessels which have received a construction-differential subsidy under title V of the Merchant Marine Act of 1936; and a mail subsidy is not a construction-differential subsidy within the meaning of section 902 (b) of the act.

Rule 9.—Valuations agreed upon by the Administrator and owners are binding, if not in excess of just compensation determined as above prescribed; and settlements should be made on the basis of such valuations with an allowance for any actual loss due to the delay in payment from the date when such settlements would have been made, if no objections had been raised, not exceeding the current commercial rate of interest.

Rule 10.—Agreements fixing compensation for the title or use of vessels are not binding in the valuation of vessels of owners not parties to the agreements. Such valuations; however, if freely arrived at, may be considered along with other factors as some evidence of value.

LEARNED HAND.
JOHN J. PARKER.
JOSEPH C. HUTCHESON, JR.

DECEMBER 7, 1943.

APPENDIX C

Letter of Transmittal and Report of Second Advisory Board on Just Compensation

Advisory Board on Just Compensation,
Washington, D. C., October 26, 1945.

Dear Admiral Land: We are herewith enclosing our report as the Advisory Board on Just Compensation, supplementing the rules stated by the Board, as previously constituted, on December 7, 1943, and setting forth in particular the standards and principles to be observed in respect of the valuation of idle foreign merchant vessels requisitioned for title or use under Public Law 101, 77th Congress (Act of June 6, 1941, 55 Stat. 242).

This report in the main merely amplifies the earlier report of the Board. Since the problems involved now turn almost wholly on issues of fact which were presented to us in sharply disputed form, we could do no more than restate more explicitly, as applicable to the precise issues here involved, the appropriate rules of law relied on in the earlier report. We realize that the concern of the parties is more as to the application of the rules of law to the facts than as to the statement of such rules; and we regret that the factual disputes prevent us from being more helpful at this stage of the proceedings. Nevertheless, we believe that the rules here stated, applied reasonably and justly to the interests of the owners and the United States alike, will give you the basis upon which you can make the neces-

sary findings of fact for the application of the statutory directive.

We invite your particular attention to our Supplementary Rule 5, wherein we point out that it is neither legally possible nor practicable to state rules determining the amount or extent of weight to be given to the various matters of evidence relevant to the issue of value which is the basis for the determination of just compensation for the requisitioned vessels. When such matters arise in courts of law, the trier of facts, whether court or jury, cannot be required, in the exercise of reasoned judgment, to attribute a specific weight to each of the elements considered in reaching a final conclusion; indeed, any attempt so to restrict judgment would be legally erroneous. We can see that lack of such definite apportionment of values to the evidence here pertinent will make it more difficult for you to develop a general directive comparable, for example, to your former Order 37 which seems to have been remarkably effective in bringing about satisfactory adjustments with American owners pursuant to the rules announced previously by the Board. Nevertheless, we think that since the determinations of fact here requisite are to a considerable extent of a general nature applicable to many vessels, you may, if you so choose, follow your previous practice in substance by making general findings from the evidence, such as, the extent, if any, of the depressive effect of the burdens, and the extent, if any, of a rise in value of the vessels up to the time of taking due to a general rise in value of merchant vessels, and either offset the two if you find them to be substantially equal,

or make such other disposition as the facts require, thus developing a general standard of valuation applicable, with necessary modifications in particular instances, to most of the vessels involved. Our rules do not prevent the adoption of such a general standard provided that it is arrived at as a reasoned conclusion from all the relevant facts.

We have been greatly aided by the very careful briefs and informative arguments of all the counsel here involved and with the admirable spirit shown of desiring and reaching for a solution of these important and troublesome questions. We have no doubt that with the continuance of that spirit they will be resolved with dispatch and to the satisfaction of all concerned.

Respectfully.

(Signed) JOSEPH C. HUTCHESON, JR.
(Signed) CHARLES E. CLARK.
(Signed) IRWIN UNTERMEYER.

Admiral EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the orders of the President of September 10 and 24, 1945, re-establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States" establishes "fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisi-

tioned pursuant to the Act of June 6, 1941, 55 Stat. 242".

Supplementary Rule 1.—The rules promulgated by this Board on December 7, 1943, as here modified, are reasserted and held applicable to the pending questions before the War Shipping Administration. In particular, Rule 2, providing, "In the case of requisition of foreign-flag vessels under Public Law 101, [Act of June 6, 1941, 55 Stat. 242] just compensation should be determined as in the case of domestic vessels" shall apply. The statement in Rule 1 that "Value means value on the American market, not on foreign markets" is modified as applied to the foreign merchant vessels here involved to read, "Value means value of the vessel in the port where the taking occurs with due regard to value on any available foreign market". Hence, the Administrator, in finding value pursuant to Rule 3, should give due weight to values shown to exist on accessible foreign markets, subject to any additions or deductions due to the then positions of the vessels.

Supplementary Rule 2.—Relevant facts on the issue of value of the vessels, as defined in Rules 1 and 3, may properly include (if their existence be found) sales upon foreign markets, including South American markets, charters or attempts or failures to charter on American and foreign markets, and like evidence bearing upon "the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy". In weighing such evidence, the Administrator should test its persuasive force in the light of any showing of

markedly different circumstances, unusual conditions, limited numbers, lack of bona fides, or conditional character, of such sales or of other factors lessening its utility for resolving the ultimate question as herein stated. The Administrator should also consider the effect of any special circumstances or conditions or burdens affecting the vessels here involved, and not equally applicable to others as to which evidence of sales prices has been received, and determine the price which would probably result from fair negotiations as above described, as to vessels thus burdened. In this connection consideration should be given to the effect, on the date of requisition, of the probable duration of such conditions or burdens (if found to exist) in the light of the existing international situation, the uncertainties of war and the consequences of any reasonably foreseeable action by the various Governments interested in the use or disposition of the vessels.

Supplementary Rule 3.—Market value as distinguished from value otherwise determined under Rule 3 means value in the foreign or domestic markets, provided that the existence of such markets is established by evidence showing:

(1) The market is available to the owners of the requisitioned vessels at the dates of requisition.

(2) There have been sufficient sales on such market of vessels of like character at or about the time of requisition to support the conclusion that such a market exists.

(3) The sales must be bona fide, and not in fact concealed reservations of title.

(4) The markets must be adequate to absorb the supply of vessels offered.

If more than one market was available, value should be based on the highest available market in accordance with the provisions of Supplementary Rule 1. From such market value, if found, must be deducted any enhancement of value excludable under Rule 4.

Supplementary Rule 4.—Under the circumstances here disclosed by the parties, namely a very grave dispute of fact as to the existence of market values, the Administrator may properly resort to the other evidential factors stated in Rule 3 as tending to show value, including in addition to the matters stated in that rule, owners' admissions, offers to sell or charter and prior valuations, and accord them such weight as under the circumstances of their utterance appears fair and just. In applying Rule 3, the factor of reproduction costs does not necessarily imply reproduction in American shipyards, but should be determined on the basis of the available place or places where a reasonably prudent shipowner probably would have undertaken to reproduce the requisitioned vessels. The actual cost at which replacement has been made by an owner is evidence of such reproduction costs. While reproduction costs shall be depreciated according to the age of the vessels, no fixed rate of depreciation can be stated; the amount of depreciation must be found by the Administrator in the light of approved expert opinion or other relevant evidence before him.

Supplementary Rule 5.—Since under settled precedents "in accordance with the applicable

provisions of the Constitution and the laws of the United States", the various matters referred to in Supplementary Rule 4 are to be given such weight by the Administrator as in his opinion they are entitled to, in determining the price that would probably result from fair negotiations as stated in Rule 3, no rules can legally or practicably be stated to govern the exercise of that judgment, which must be guided by the strength and force of the evidence. It is considered, however, that certain evidence is normally of greater persuasive force than other evidence, in this order: first, sales prices in an open market, if any; second, fair reproduction and replacement costs, and third, the other factors herein claimed by the parties. As to matters offered to show a peculiar depressing effect on the fair sale value, such as the existence of special circumstances and burdens, the Administrator should properly require the affirmative establishment both of their existence and of their probable effect upon the price which a purchaser would be willing to pay for the vessels.

Supplementary Rule 6.—The time as to which value is to be fixed is the time of requisition, and values at periods either before or after such time shall be evidential only and not controlling as to the value for "just compensation". The provision in Rule 4 that "Enhancement due to a general rise in prices or earnings, whenever occurring shall not be deducted" shall be taken to include a general rise in prices and earnings of merchant vessels, not due to the Government's need of vessels which has necessitated the taking, to the pre-

vious taking of vessels of similar type, or to a prospective taking, which is reasonably probable.

Supplementary Rule 7.—As to the shipowners here involved, it appears just and equitable that compensation for loss due to delay in payment, provided in Rule 9, shall be paid in each case at the current commercial rate of interest, without discrimination depending upon the financial or other circumstances of each owner. Such rate of interest shall be the rate found by the Administrator to be the rate at which solvent business corporations could have borrowed the money for a period not shorter than the already existing period of delay. Mere failure to provide information or otherwise actively to cooperate with the Administrator in fulfilling his statutory duties of determining just compensation and causing deposit thereof with the Treasurer of the United States shall not be a bar to its payment, but compensation may be denied for any period of delay caused by affirmative action of a shipowner, such as a request by such owner that the determination of just compensation be delayed for his convenience.

Supplementary Rule 8.—These rules conform to the requirements of the Constitution of the United States and with the applicable standards of international law.

(Signed) Joseph C. Hutcheson, Jr.
JOSEPH C. HUTCHESON, JR.
(Signed) Charles E. Clark.
CHARLES E. CLARK.
(Signed) Irwin Untermeyer.
IRWIN UNTERMEYER.

OCTOBER 26, 1945.

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